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Conseil de sécurité

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Lettre datée du 15 avril 2002, adressée au Président du Conseil de sécurité par le Secrétaire général

Conformément au paragraphe 13 de l'article 4 de l'Accord de paix du 12 décembre 2000, la Commission du tracé de la frontière entre l'Érythrée et l'Éthiopie a communiqué sa décision concernant la démarcation de la frontière aux parties et aux secrétaires généraux de l'Organisation de l'unité africaine et de l'Organisation des Nations Unies pour publication. La décision, transmise le 13 avril 2002, est jointe en annexe à la présente lettre*.

Je vous serais reconnaissant de bien vouloir porter le texte de cette décision à l'attention des membres du Conseil.

(*Signé*) Kofi A. **Annan**

* Le texte de la décision est distribué uniquement dans la langue de l'original.

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Annex

Eritrea - Ethiopia Boundary Commission

DECISION

Regarding Delimitation of the Border

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

By the Boundary Commission, composed of:

Professor Sir Elihu Lauterpacht, CBE, QC, President
Prince Bola Adesumbo Ajibola, SAN, KBE, CFR
Professor W. Michael Reisman
Judge Stephen M. Schwebel
Sir Arthur Watts, KCMG, QC

DECISION Regarding Delimitation of the Border
between
The State of Eritrea, represented by:

GOVERNMENT OF ERITREA
His Excellency Mr. Ali Said Abdella, Foreign Minister of the State of Eritrea, Agent
Professor Lea Brilmayer, Co-Agent, Legal Advisor to the Office of the President of Eritrea, "Howard M. Holtzmann Professor of International Law", Yale University School of Law
His Excellency Mr. Mohammed Suleiman Ahmed, Ambassador of the State of Eritrea to the Netherlands
Mr. Habtom Gebremichael, Ministry of Foreign Affairs, State of Eritrea
Ms. Megan Munzert, Associate Legal Advisor to the Office of the President of Eritrea
COUNSEL AND ADVOCATES
Mr. O. Thomas Johnson, Covington and Burling; Member of the Bar of the District of Columbia
Professor James Crawford, SC, FBA, Whewell Professor of International Law, University of Cambridge; Member of the Australian and English Bars; Member of the Institute of International Law
COUNSEL AND CONSULTANTS
Mr. Eric Brown, Covington and Burling; Member of the Bar of the District of Columbia
Ms. Chiara Giorgetti, Dottoressa in Giurisprudenza, Università di Bologna
Ms. Karin Kizer, Covington and Burling; Member of the Bar of the District of Columbia
Ms. Natalie Klein, Debevoise and Plimpton; Barrister and Solicitor of the Supreme Court of Australia
Professor Yemane Meshginna, Department of Political Science, the University of Asmara
Ms. Erin Casey, Yale University School of Law
Ms. Amanda Jones, Yale University School of Law
Ms. Suma Nair, Covington and Burling

and The Federal Democratic Republic of Ethiopia, represented by:

GOVERNMENT OF ETHIOPIA
His Excellency Mr. Seyoum Mesfin, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia, Agent
His Excellency Ambassador Mr. Fisseha Yimer, Ambassador of the Federal Democratic Republic of Ethiopia to Switzerland and to the United Nations in Geneva, Co-Agent
Mr. Seifeselassie Lemma, Director of Legal Affairs, Ministry of Foreign Affairs of the Federal Democratic Republic of Ethiopia
COUNSEL AND ADVOCATES
Mr. Ian Brownlie, CBE, QC, FBA, Chichele Professor of Public International Law (Emeritus), University of Oxford; Member of the International Law Commission; Member of the English Bar; Member of the Institut de droit international
Mr. B. Donovan Picard, Verner, Liipfert, Bernhard, McPherson & Hand, Washington DC; Member of the Bar of the District of Columbia; Member of the Bar of the Supreme Court of the United States
Mr. Rodman R. Bundy, Frere Cholmeley/Eversheds, Paris; avocat à la Cour d'appel de Paris, Member of the New York Bar
Ms. Loretta Malintoppi, Frere Cholmeley/Eversheds, Paris; avocat à la Cour d'appel de Paris, Member of the Rome Bar
Mr. Dylan D. Cors, Verner, Liipfert, Bernhard, McPherson & Hand, Washington DC; Member of the Bar of the District of Columbia
COUNSEL AND CONSULTANTS
Mr. Scott Edmonds, International Mapping Associates, Columbia, Maryland, President
Mr. Robert Rizzutti, International Mapping Associates, Columbia, Maryland, Vice President
Ms. Cheryl Dunn, Frere Cholmeley/Eversheds, Paris; Member of the State Bar of California
Mr. Charles Claypoole, Frere Cholmeley/Eversheds, Paris; Solicitor of the Supreme Court of England and Wales
Mr. Justin M. Cawley, Verner, Liipfert, Bernhard, McPherson & Hand, Washington, DC; Member of the Bar of the District of Columbia
Mr. Gregson A. Thoms, III, Verner, Liipfert, Bernhard, McPherson & Hand, Washington, DC, Consultant

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* Maps 14 and 15 are deposited at the Cartographic Section (Room L-172) of the Dag Hammarskjöld Library, United Nations Secretariat Building, and are available for viewing by appointment between the hours of 9.30 a.m. and 5.00 p.m., Monday to Friday.

GLOSSARY OF GEOGRAPHIC PLACE NAMES

This Glossary contains names of those geographic features and locations referred to in the Decision of which there are variant spellings. The spelling used in the Decision is listed first in bold, followed by the variant(s).

A

Acchele Guzai – Akologuzay; Okologezay
Agame – Agamie
Ala Tacura – Ala Takura
Alitena – Alitiena

B

Baza – Baze; Basé
Belesa – Belessa; Mestai Mes; Ruba Dairo; Rubai Daro; Sur; Tserona
Bure – Burre

C

Cunama – Canama; Kunama

E

Enda Dashim – Enda Dascim; Ruba Enda Dascin

G

Gasc – Gash
Gogula – Collina Gugula

K

Kelloberda – Kolo Burdo

M

Mai Ambessa – Mai Anbessa
Mai Daro – Maidaro; Mai Doro
Maiteb – Maieteb; Maietebe; Maietebbe; Maitebbe
Maiten – Mai Ten; Mai Tenne; Mai Tenné; Maitenné
Mareb – Mereb
Mochiti – Moketti
Muna/Berbero Gado – Mai Muna; T. Mai Muna; Maj Mena; Mouna

S

Setit – Settite
Shimezana – Scimezana
Sittona – Maetebbe/Maeeteb; Sittone

T

Tigray – Tigrai; Tigre

DECISION REGARDING DELIMITATION OF THE BORDER

CHAPTER I – PROCEDURAL INTRODUCTION

1.1 The Eritrea-Ethiopia Boundary Commission (hereinafter the "Commission") was established pursuant to an agreement dated 12 December 2000, alternately entitled "Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia" and "Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea" (hereinafter the "December Agreement").

1.2 Article 4 of the December Agreement provides as follows:

> 1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.
>
> 2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.
>
> 3. The Commission shall be located in The Hague.
>
> 4. Each party shall, by written notice to the United Nations Secretary-General, appoint two commissioners within 45 days from the effective date of this agreement, neither of whom shall be nationals or permanent residents of the party making the appointment. In the event that a party fails to name one or both of its party-appointed commissioners within the specified time, the Secretary-General of the United Nations shall make the appointment.
>
> 5. The president of the Commission shall be selected by the party-appointed commissioners or, failing their agreement within 30 days of the date of appointment of the latest party-appointed commissioner, by the Secretary-General of the United Nations after consultation with the parties. The president shall be neither a national nor permanent resident of either party.
>
> 6. In the event of the death or resignation of a commissioner in the course of the proceedings, a substitute commissioner shall be appointed or chosen pursuant to the procedure set forth in this paragraph that was

applicable to the appointment or choice of the commissioner being replaced.

7. The UN Cartographer shall serve as Secretary to the Commission and undertake such tasks as assigned to him by the Commission, making use of the technical expertise of the UN Cartographic Unit. The Commission may also engage the services of additional experts as it deems necessary.

8. Within 45 days after the effective date of this Agreement, each party shall provide to the Secretary its claims and evidence relevant to the mandate of the Commission. These shall be provided to the other party by the Secretary.

9. After reviewing such evidence and within 45 days of its receipt, the Secretary shall subsequently transmit to the Commission and the parties any materials relevant to the mandate of the Commission as well as his findings identifying those portions of the border as to which there appears to be no dispute between the parties. The Secretary shall also transmit to the Commission all the evidence presented by the parties.

10. With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures.

11. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Option Rules for Arbitrating Disputes Between Two States. Filing deadlines for the parties' written submissions shall be simultaneous rather than consecutive. All decisions of the Commission shall be made by a majority of the commissioners.

12. The Commission shall commence its work not more than 15 days after it is constituted and shall endeavor to make its decision concerning delimitation of the border within six months of its first meeting. The Commission shall take this objective into consideration when establishing its schedule. At its discretion, the Commission may extend this deadline.

13. Upon reaching a final decision regarding delimitation of the borders, the Commission shall transmit its decision to the parties and Secretaries General of the OAU and the United Nations for publication, and the Commission shall arrange for expeditious demarcation.

14. The parties agree to cooperate with the Commission, its experts and other staff in all respects during the process of delimitation and demarcation, including the facilitation of access to territory they control. Each party shall accord to the Commission and its employees

the same privileges and immunities as are accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations.

15. The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party.

16. Recognizing that the results of the delimitation and demarcation process are not yet known, the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory.

17. The expenses of the Commission shall be borne equally by the two parties. To defray its expenses, the Commission may accept donations from the United Nations Trust Fund established under paragraph 8 of Security Council Resolution 1177 of 26 June 1998.

1.3 By 26 January 2001, within the time limits provided in Article 4, paragraph 4, of the December Agreement, and by written notice to the United Nations Secretary-General as further provided therein, Eritrea appointed as Commissioners Mr. Jan Paulsson and Judge Stephen M. Schwebel, and Ethiopia appointed as Commissioners His Excellency Prince Bola Adesumbo Ajibola and Sir Arthur Watts.

1.4 By virtue of Article 4, paragraph 7, of the December Agreement, Dr. Hiroshi Murakami, Chief of the Cartographic Section of the Secretariat of the United Nations, acted as Secretary of the Commission (hereinafter the "Secretary") at all material times and rendered important cartographical and other technical assistance to the Commission. He was assisted principally by Ms. Alice Chow and Ms. Hélène Bray. On 26 January 2001, the Parties submitted to the Secretary their claims and evidence relevant to the mandate of the Commission, as required by Article 4, paragraph 8, of the December Agreement.

1.5 In accordance with Article 4, paragraph 5, of the December Agreement, the party-appointed Commissioners selected as President of the Commission Professor Sir Elihu Lauterpacht, who accepted his appointment on 20 February 2001.

1.6 By a letter to the Secretary dated 2 March 2001, the Permanent Representative of Ethiopia lodged a challenge to the appointment by Eritrea of Mr. Paulsson. The Secretary transmitted this letter to the Commissioners, the Permanent Representative of Eritrea and the Secretary-General of the United Nations.

1.7 On 2 March 2001, Ethiopia informally notified the International Bureau of the Permanent Court of Arbitration of the designation of His Excellency Seyoum Mesfin, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia, as Agent, and of His Excellency Ambassador Fisseha Yimer, Per-

manent Representative of the Federal Democratic Republic of Ethiopia to the United Nations at Geneva, as Co-Agent.

1.8 On 14 March 2001, Eritrea informally notified the International Bureau of the Permanent Court of Arbitration of the designation of His Excellency Ali Said Abdella, Foreign Minister of Eritrea, as Agent, and of Professor Lea Brilmayer as Co-Agent.

1.9 Article 4, paragraph 9, of the December Agreement charged the Secretary with, *inter alia*, making findings identifying those portions of the border as to which there appeared to be no dispute between the Parties. On 12 March 2001, the Secretary transmitted his findings to the Parties and to the Commissioners. On 23 March 2001, the Government of Ethiopia reserved its position with respect to those findings. The Secretary's findings were based entirely on the materials theretofore made available to him by the Parties, and were not intended to be dispositive of any aspects of the delimitation. According to Article 4, paragraph 10, of the December Agreement, the Parties' subsequent submissions to the Commission were to address those portions of the border about which there appeared to be controversy, as well as any portions of the border identified by the Secretary with respect to which either Party believed there to be controversy.

1.10 The Commission met in The Hague on 25 March 2001. On 26 March 2001, an informal meeting was held between the Commission and representatives of the Parties to discuss procedural matters, without prejudice to the position of the Parties pending the resolution of the outstanding challenge to Mr. Paulsson. The Secretary was also present. At this meeting, the Parties agreed that, in addition to the Secretary provided for in the December Agreement, there should be appointed to assist the Commission a legally-qualified Registrar. Ms. Bette E. Shifman, Deputy Secretary-General of the Permanent Court of Arbitration, was accordingly appointed, and she has so acted throughout the proceedings, with the assistance principally of Mr. Dane Ratliff and of the staff of the Permanent Court of Arbitration.

1.11 Among the matters discussed and tentatively agreed on at the meeting of 26 March 2001 was a schedule for the first phase of the Commission's work (the delimitation of the border), according to which the Parties would simultaneously file written Memorials on 30 June 2001 and Counter-Memorials on 22 September 2001. Consideration would then be given to whether the Parties would exchange Replies. A pre-hearing consultation between the Commission and the Parties was scheduled for 6 November 2001. It was tentatively agreed that hearings would be held in The Hague between 10 and 21 December 2001. Although Article 4, paragraph 12, of the December Agreement stipulates that the Commission is to "endeavor to make its decision concerning delimitation of the border within six months of its first meeting," it was accepted by the Parties and the Commission that this was not practicable.

1.12 On 5 April 2001, the President of the Commission signed an Order, adopting an "Interim Rule of Procedure" as follows:

> Whereas Article 4, paragraph 11, of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of 12 December, 2000, requires the Commission to adopt its own Rules of Procedure;
>
> whereas one of the Commissioners has been challenged by a Party, thus occasioning an immediate need for a Rule of Procedure to regulate the matter;
>
> and whereas the Commission has not as yet prepared a complete set of Rules of Procedure including a rule relating to challenge;
>
> the Commission has adopted the following Interim Rule of Procedure limited to one aspect of this matter and without prejudice to the adoption in due course of a full set of Rules of Procedure within which this Rule (subject to any necessary amendment) will be incorporated:
>
> > CHALLENGE OF COMMISSIONERS – A challenge to a member of the Commission shall be decided by those members of the Commission whose appointments are not challenged. If they cannot reach a decision, the President shall refer the challenge to the Secretary-General of the United Nations for decision.

This Order was duly communicated to the Parties by the Registrar.

1.13 Also on 5 April 2001, the President of the Commission informed the Secretary-General of the United Nations of the contents of the Order, and of the fact that the four Commissioners whose appointments had not been challenged had been unable to reach a decision on the challenge to Mr. Paulsson, and accordingly referred the challenge to the Secretary-General for decision.

1.14 By a letter dated 15 May 2001, Mr. Paulsson tendered his resignation as a member of the Boundary Commission, it being understood that this resignation did not imply any acceptance of the validity of the alleged grounds for the challenge. In accordance with Article 4, paragraph 6, of the December Agreement, Eritrea appointed, on 12 June 2001, Professor W. Michael Reisman to fill the vacancy created by Mr. Paulsson's resignation.

1.15 On 20 June 2001, the Commission adopted its Rules of Procedure (hereinafter the "Rules"), based, as required by Article 4, paragraph 11, of the December Agreement, on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Article 16(2) of the Rules sets forth the schedule for written submissions tentatively agreed at the meeting of 25 March 2001, i.e., a Memorial to be filed by each Party by 30 June 2001, a Counter-Memorial to be filed by each Party not later than 22 September 2001, and any other pleading that the Commission deemed necessary after consulting

the Parties, to be filed not later than one month after filing of the Counter-Memorials.

1.16 Both Parties filed their Memorials with the Registrar within the time limits provided in the Rules. On 16 July 2001, the President held an informal meeting with the representatives of the Parties in order to discuss various matters relating to the ongoing work of the Commission.

1.17 The Parties filed their Counter-Memorials on 30 September 2001 and, pursuant to Article 16(2) of the Rules, the Commission decided, after consulting the Parties, to authorize an exchange of Replies. These were duly filed with the Registrar on 29 October 2001.

1.18 As provided in Article 16(4) of the Rules, the written phase of the pleadings was closed upon the filing of the Replies. A pre-hearing consultation was held with the Parties on 6 November 2001, at the premises of the Permanent Court of Arbitration in The Hague, at which procedural details relating to the hearings were settled. At that meeting, the Commission requested the Parties to provide to the Commission, as expeditiously as possible, originals or full-scale copies of all maps that had been produced in evidence, and these were subsequently submitted by the Parties.

1.19 Hearings were held at the Peace Palace in The Hague from 10 through 21 December 2001, during which oral arguments and replies were heard from the following:

For Eritrea: His Excellency Ali Said Abdella, Foreign Minister of Eritrea, Agent
Professor Lea Brilmayer, Co-Agent
Mr. O. Thomas Johnson
Professor James Crawford, SC

For Ethiopia: His Excellency Seyoum Mesfin, Minister of Foreign Affairs of Ethiopia, Agent
Mr. B. Donovan Picard
Mr. Ian Brownlie, CBE, QC
Mr. Rodman R. Bundy
Ms. Loretta Malintoppi
Mr. Dylan D. Cors

1.20 In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Eritrea,

in the Memorial:

> For the reasons set out in this Memorial, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.1 above and in Map 1 in Eritrea's Atlas.

in the Counter-Memorial:

> For the reasons set out in this Counter-Memorial, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.01 in Eritrea's Memorial and in Map 1 in Eritrea's Memorial Atlas.

in the Reply:

> For the reasons set out in this Reply, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.01 in Eritrea's Memorial and in Map 1 in Eritrea's Memorial Atlas.

On behalf of Ethiopia,

in the Memorial:

> *On the basis* of the facts and legal arguments presented in this Memorial; and *Considering that* Article 4 of the 12 December 2000 Agreement provides in the relevant part of paragraph 2 that –
>
> > The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law;
>
> and in paragraph 10 that –
>
> > With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their

written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures;

The Federal Democratic Republic of Ethiopia, while reserving the right to supplement or amend these Submissions in the light of further pleadings in the case, respectfully requests the Commission to adjudge and declare:

- That the boundary in accordance with the Treaty of 1900 is constituted by the line described in Chapter 4, paragraph 4.7 above;
- That the boundary in accordance with the Treaty of 1902 is constituted by the line described in Chapter 4, paragraph 4.8 above;
- That the boundary in accordance with the Treaty of 1908 is to be delimited and demarcated on the basis of the modus operandi described in Chapter 3, paragraphs 3.216 to 3.223 and Chapter 4, paragraph 4.9 above.

in the Counter-Memorial:

On the basis of the facts and legal arguments presented in Ethiopia's Memorial and Counter-Memorial; and

Rejecting the Submissions of Eritrea set forth in her Memorial;

The Federal Democratic Republic of Ethiopia, while reserving its right to supplement or amend these Submissions in the light of further pleadings in the case, respectfully requests the Commission to adjudge and declare:

- That the boundary in accordance with the Treaty of 1900 is constituted by the line described and illustrated in Chapter 2 of this Counter-Memorial;
- That the boundary in accordance with the Treaty of 1902 is constituted by the line described and illustrated in Chapter 3 of this Counter-Memorial; and
- That the boundary in accordance with the Treaty of 1908 is constituted in accordance with the methodology and considerations described and illustrated in Chapter 4 of this Counter-Memorial.

in the Reply:

> On the basis of the foregoing, and rejecting Eritrea's contentions to the contrary, Ethiopia confirms the Submissions as set out at the end of her Counter-Memorial.

In the oral proceedings, the following submissions were presented by the Parties:

On behalf of Eritrea,

at the hearing of 20 December 2001:

> It is respectfully submitted that the boundary between the two parties is that depicted in map 1 of Eritrea's memorial atlas, the coordinates of which are more fully described in the 1:50,000 map that Eritrea has deposited with the Secretary.

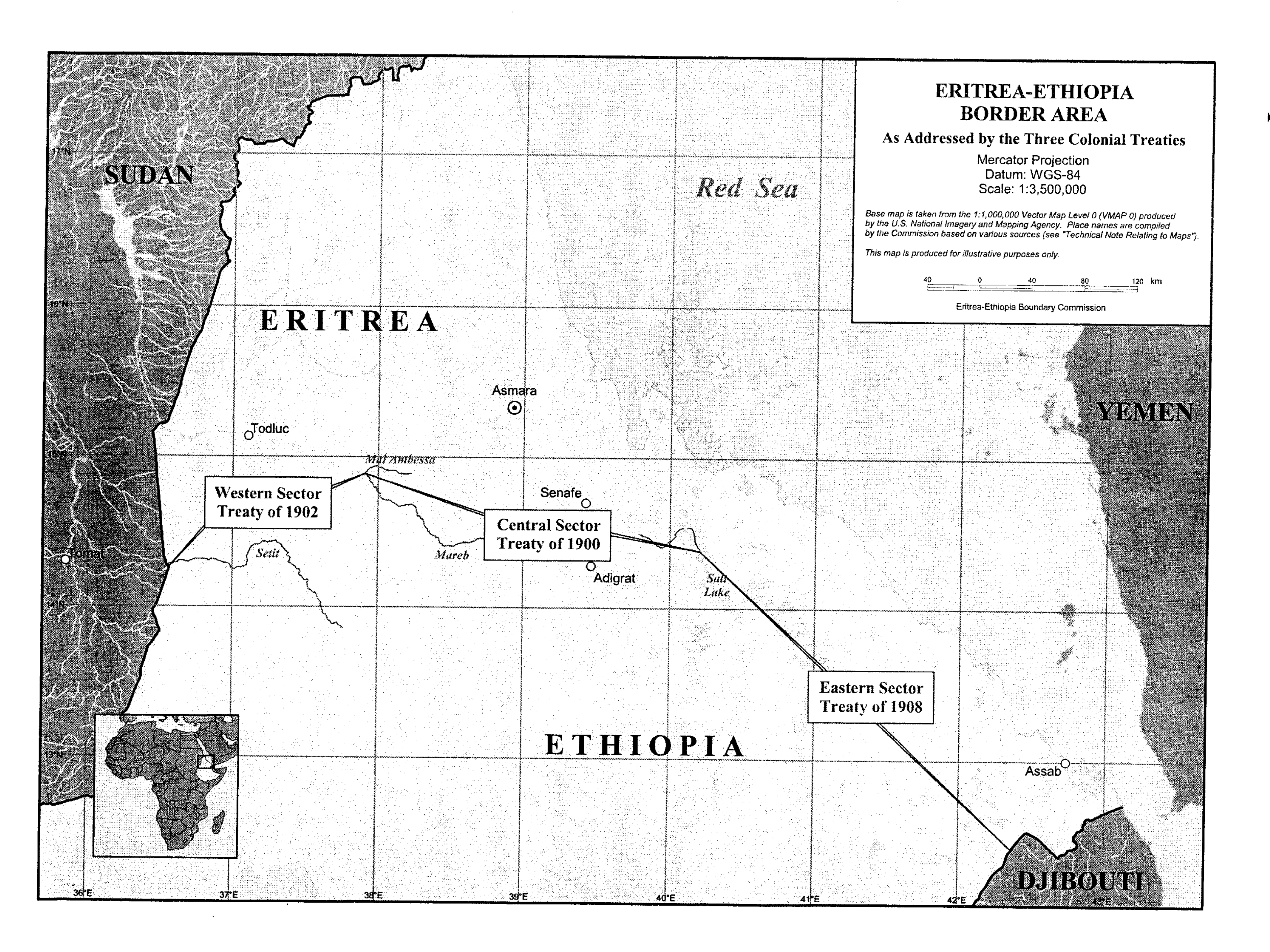
On behalf of Ethiopia,

at the hearing of 21 December 2001:

> The Federal Democratic Republic of Ethiopia respectfully requests the Commission to adjudge and declare, first, that the boundary, in accordance with the treaty of 1900, is constituted by the line described and illustrated in chapter 2 of the counter-memorial; secondly, that the boundary in accordance with the treaty of 1902 is constituted by the line described and illustrated in chapter 3 of the counter-memorial; and, thirdly, and finally, that the boundary, in accordance with the treaty of 1908, is constituted in accordance with the methodology and considerations described and illustrated in the oral hearings.

* - * - *

Map 1



ERITREA-ETHIOPIA
BORDER AREA
As Addressed by the Three Colonial Treaties
Mercator Projection
Datum: WGS-84
Scale: 1:3,500,000
Base map is taken from the 1:1,000,000 Vector Map Level 0 (VMAP 0) produced by the U.S. National Imagery and Mapping Agency. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only.
40 0 40 80 120 km
Eritrea-Ethiopia Boundary Commission
SUDAN
Red Sea
ERITREA
YEMEN
ETHIOPIA
DJIBOUTI
Asmara
Todluc
Senafe
Adigrat
Tomat
Assab
Mai Ambessa
Setit
Mareb
Salt Lake
Western Sector
Treaty of 1902
Central Sector
Treaty of 1900
Eastern Sector
Treaty of 1908
36°E
37°E
38°E
39°E
40°E
41°E
42°E
43°E

CHAPTER II – SUBSTANTIVE INTRODUCTION

2.1 The present Decision will be developed in eight Chapters.

2.2 Following this substantive introduction, the Commission will, in Chapter III, present its understanding of its task and of the law to be applied to it.

2.3 In Chapters IV, V and VI, the Commission will examine the border in the three sectors – central, western and eastern – corresponding to the portions initially defined by the three Treaties of 1900, 1902 and 1908 respectively.

2.4 Chapter VII will consider the question of the boundary within the relevant rivers.

2.5 Lastly, Chapter VIII will contain the *Dispositif* of the present Decision.

A. BACKGROUND

2.6 There is little need to present any detailed account of the history of the Parties or their relations outside the events that are immediately relevant to the issues before the Commission and which will be treated at appropriate points in this Decision. However, a few introductory historical notes are in order.

2.7 Ethiopia has for long been an independent member of the international community. Apart from the period following its annexation by Italy in 1935 (see below), there has been no relevant discontinuity or change in its status. The position of Eritrea is different. Prior to the 1880s, large parts of it had been subject to Ottoman and Egyptian authority. During that decade, Italy began to assert a colonial presence in the region, first at the Red Sea port of Assab and in 1885 at Massawa. Subsequent Italian attempts to expand its control inland were successfully resisted by Ethiopian forces. However, in 1889, by the Treaty of Uccialli, Ethiopia and Italy established the boundary between the Empire of Ethiopia and the areas of Eritrea then in Italian possession. On 1 January 1890, Italy formally established the Colony of Eritrea. In 1893, the Ethiopian Emperor Menelik denounced the Treaty of Uccialli, but Italian expansion inland continued until the battle of Adwa in 1896, in which Italian forces were defeated. A temporary boundary arrangement was then established between Ethiopia and Italy. Subsequently, in 1900, 1902 and 1908, Ethiopia and Italy concluded three boundary agreements that, together, addressed the entire common boundary of the Colony of Eritrea and the Empire of Ethiopia. None of the boundaries thus agreed was demarcated. Indeed, as will be seen, each of these boundaries was, to varying degrees, not fully delimited.

2.8 In 1935, Italy invaded, occupied and annexed the whole of Ethiopia. In 1941, the United Kingdom expelled Italian forces from both Ethiopia and Eritrea and

established a British Military Administration, which governed both countries from headquarters in Addis Ababa. The British Military Administration ended in Ethiopia with the conclusion of an agreement between the United Kingdom and Ethiopia on 31 January 1942. Emperor Haile Selassie then resumed control of his country. The former Italian Colony of Eritrea remained under British control until 1952.

2.9 By Article 23 of the Treaty of Peace with the Allied Powers of 1947, Italy renounced "all rights and title to the Italian territorial possessions in Africa" and agreed that "pending their final disposal, the said possessions shall continue under their present administration." As the Allied Powers were not able to agree upon the disposition of Eritrea within the time period established by the Peace Treaty, the matter was referred to the United Nations General Assembly under Paragraph 3 of Annex XI of the Treaty. On 2 December 1950, the General Assembly adopted Resolution 390A(V), which recommended that "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown." The Federation of Eritrea with Ethiopia was accordingly established on 11 September 1952.

2.10 On 11 September 1952, Ethiopia declared null and void the Treaties of 1900, 1902 and 1908.[1] On 14 November 1952, Ethiopia declared the Eritrean Constitution void, ended the federal status of Eritrea, dissolved the Eritrean parliament and incorporated Eritrea into Ethiopia as a province.

2.11 Shortly after the incorporation of Eritrea into Ethiopia, an armed Eritrean resistance developed. In 1974, the Ethiopian armed forces deposed Emperor Haile Selassie, and a junta or Dergue, led by Mengistu Haile Mariam, took control of Ethiopia. The Dergue continued to prosecute the war against the Eritrean People's Liberation Front ("EPLF"). By the late 1980s, the EPLF controlled most of Eritrea except for Asmara and Massawa. In February 1990, the EPLF captured Massawa. In 1991, Mengistu fled Ethiopia and the Ethiopian People's Revolutionary Democratic Front ("EPRDF") established an interim government, while the EPLF took control of Asmara. At a Conference on Peace and Democracy held in Addis Ababa in 1991, the right of the people of Eritrea to determine their own political future by an internationally supervised referendum was recognised. In April 1993, the referendum was held in Eritrea, supervised by international observers. Eritreans abroad were also enabled to vote. Over 99% of the voters favoured independence. The United Nations Special Representative announced that the referendum process had been free and fair.

2.12 On 27 April 1993, Eritrea became independent and was admitted as a member of the United Nations. On 29 April 1993, Ethiopia recognised Eritrea's

[1] Order No. 6 of 1952.

sovereignty and independence and on 30 July 1993, the two Governments concluded an Agreement of Friendship and Co-operation.

2.13 In May 1998, hostilities broke out between Eritrea and Ethiopia. After a number of attempts to re-establish peace between the two Parties, the December Agreement was signed on 12 December 2000, providing for the permanent termination of military hostilities between them. A major component of this Agreement was Article 4, the terms of which have been set out above, providing for the establishment of the present Commission.

B. THE SUBJECT OF THE DISPUTE – GEOGRAPHICAL DESCRIPTION OF THE BOUNDARY

2.14 The dispute relates to the precise location of extensive parts of the boundary between Eritrea and Ethiopia.

2.15 It will be convenient to begin by describing geographically the areas in which the location of the boundary is contested, without referring, for the moment, to the chronological order of the treaties mentioned in Article 4 of the December Agreement.

2.16 For convenience, maps of each sector are provided on the pages following. A number of points on these maps have, for ease of reference, been given numbers. A complete list of all the points to which numbers have been given will be found in Chapter VIII, paragraph 8.3 (see p. 101), together with their coordinates. These coordinates are not necessarily final and the Commission may have to adjust or vary them in the course of demarcation. Only the final demarcation map will be definitive.

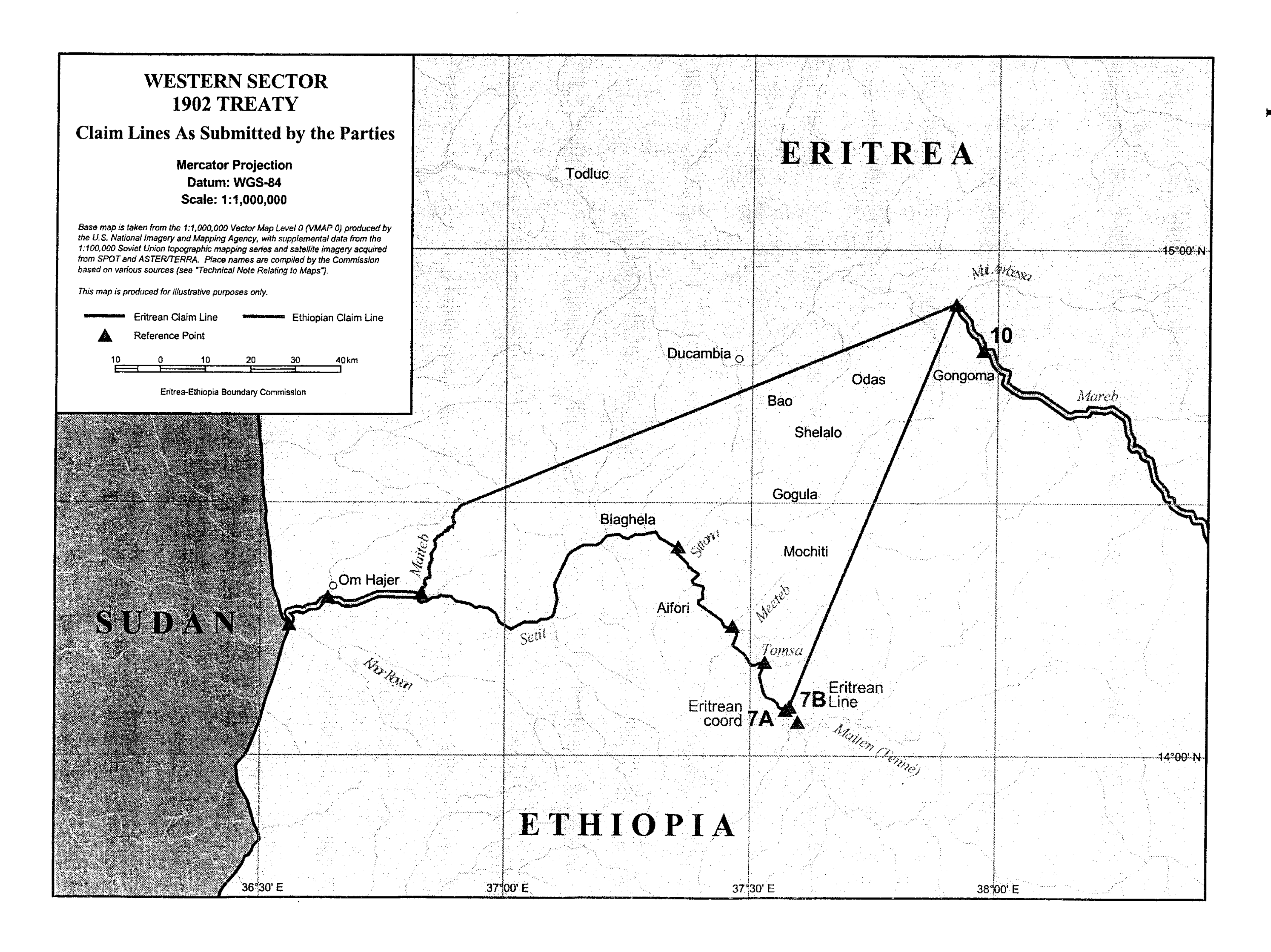
1) The termini

2.17 The boundary runs from the border with the Sudan in the west to the border with Djibouti in the east. At each end, there is a tripoint between the three relevant States.

2.18 The tripoint in the west was stated by the 1902 Treaty to be at Khor Um Hagar (Point 2). However, by subsequent agreement among Eritrea, Ethiopia and Sudan, the tripoint was moved to the confluence of the Khor Royan with the Setit (Point 1), a short distance west of Khor Um Hagar.

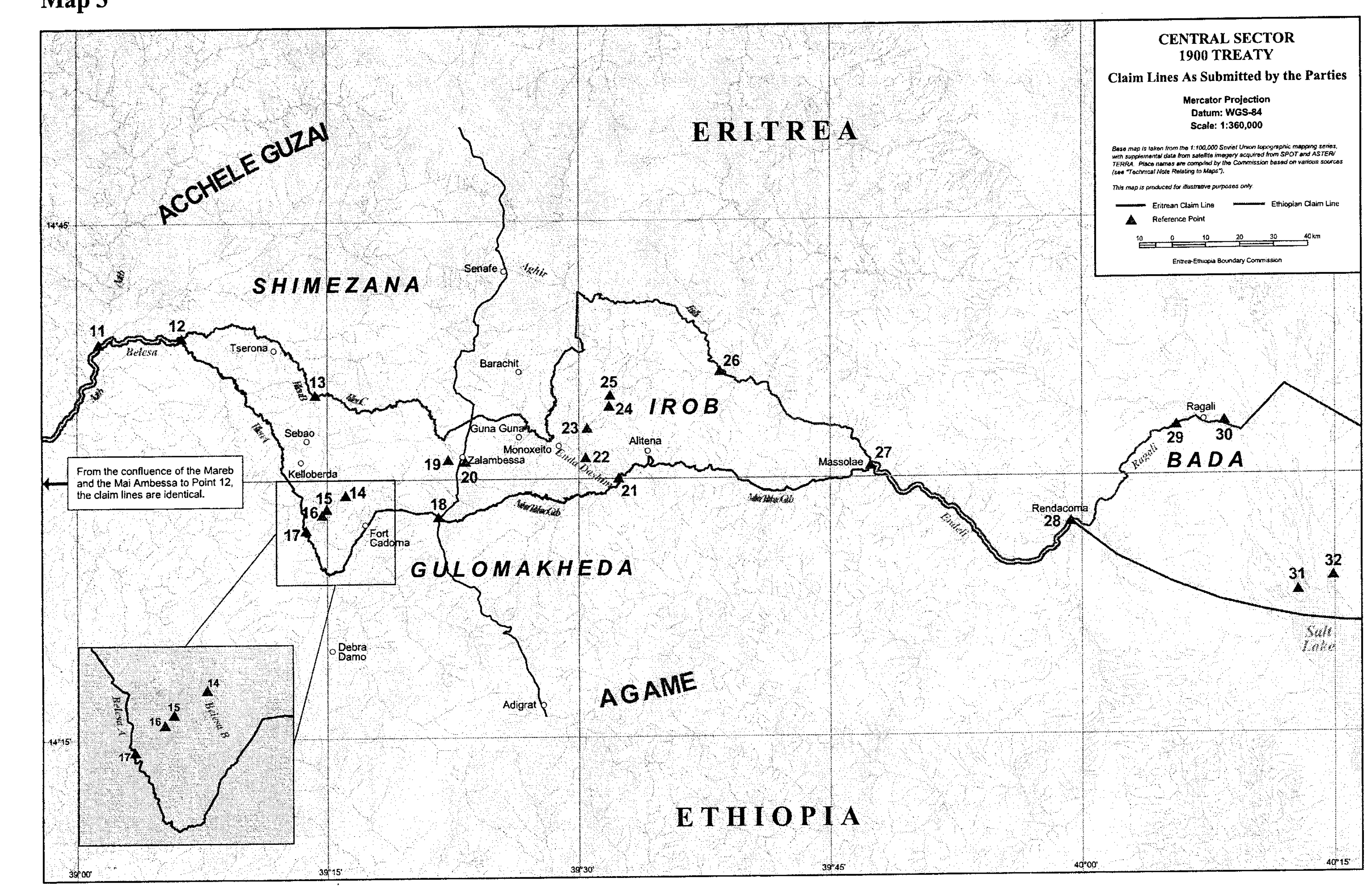
2.19 The tripoint at the eastern end has never been agreed, but, as a result of the delimitation established in the present decision, will be where the Eritrea/Ethiopia boundary meets the western boundary of Djibouti (Point 41).

Map 2



WESTERN SECTOR
1902 TREATY
Claim Lines As Submitted by the Parties
Mercator Projection
Datum: WGS-84
Scale: 1:1,000,000
Base map is taken from the 1:1,000,000 Vector Map Level 0 (VMAP 0) produced by the U.S. National Imagery and Mapping Agency, with supplemental data from the 1:100,000 Soviet Union topographic mapping series and satellite imagery acquired from SPOT and ASTER/TERRA. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only.
Eritrean Claim Line
Ethiopian Claim Line
Reference Point
10 0 10 20 30 40km
Eritrea-Ethiopia Boundary Commission
ERITREA
ETHIOPIA
SUDAN
15°00' N
14°00' N
36°30' E
37°00' E
37°30' E
38°00' E
Todluc
Ducambia
Odas
Bao
Shelalo
Gogula
Mochiti
Gongoma
10
Mareb
Biaghela
Aifori
Om Hajer
Maiteb
Setit
Meeteb
Tomsa
Eritrean Line
7B
Eritrean coord
7A
Maiten (Tenne)

Map 3


CENTRAL SECTOR
1900 TREATY
Claim Lines As Submitted by the Parties
Mercator Projection
Datum: WGS-84
Scale: 1:360,000
Base map is taken from the 1:100,000 Soviet Union topographic mapping series, with supplemental data from satellite imagery acquired from SPOT and ASTER/TERRA. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only
Eritrean Claim Line
Ethiopian Claim Line
Reference Point
10 0 10 20 30 40 km
Eritrea-Ethiopia Boundary Commission
ERITREA
ACCHELE GUZAI
SHIMEZANA
IROB
BADA
GULOMAKHEDA
AGAME
ETHIOPIA
From the confluence of the Mareb and the Mai Ambessa to Point 12, the claim lines are identical.
Senafe
Aghir
Barachit
Tserona
Sebao
Kelloberda
Guna Guna
Monoxeito
Zalambessa
Endeli
Alitena
Massolae
Ragali
Rendacoma
Fort Cadoma
Debra Damo
Adigrat
Belesa
Belesa A
Belesa B
Salt Lake
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
14°45'
14°15'
39°00'
39°15'
39°30'
39°45'
40°00'
40°15'

Map 4

EASTERN SECTOR
1908 TREATY
Claim Lines As Submitted by the Parties
Mercator Projection
Datum: WGS-84
Scale: 1:1,000,000
Base map is taken from the 1:1,000,000 Vector Map Level 0 (VMAP 0) produced by the U.S. National Mapping and Imagery Agency, with supplemental data from the 1:100,000 Soviet Union topographic mapping series and satellite imagery acquired from SPOT and ASTER/TERRA. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only.
Eritrean Claim Line
Ethiopian Claim Line
Reference Point
10 0 10 20 30 40km
Eritrea-Ethiopia Boundary Commission
Red Sea
ERITREA
ETHIOPIA
DJIBOUTI
DANAKIL
DALUL
BADA
Salt Lake
Massolae
Renda-coma
Ragali
Maglalla
Fiscio
Barale
Assab
Bure
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
14°00' N
13°30' N
13°00' N
12°30' N
40°00' E
40°30' E
41°00' E
41°30' E
42°00' E
42°30' E
43°00' E

2) The three sectors of the boundary

2.20 The boundary divides into three sectors, to each of which a different treaty is addressed: the western sector by a treaty of 1902 (the "1902 Treaty" – see Chapter V, below); the central sector by a treaty of 1900 (the "1900 Treaty" – see Chapter IV, below); and the eastern sector by a treaty of 1908 (the "1908 Treaty" – see Chapter VI, below). The boundaries laid down in the Treaties have never been implemented by demarcation.

3) The western sector

2.21 The boundary in the western sector was originally part of the subject of the 1900 Treaty but was amended by the 1902 Treaty (see Map 2, p. 14). This Treaty is written in three languages, all of which are official: Amharic, English and Italian. All three texts prescribe that the boundary shall run eastwards along the Setit to the point where it is met by a named river. In the English and Italian texts, this river is called the Maiteb. In the Amharic text, it is called the Maiten. This difference between the Amharic and the other language texts is one aspect of a confused nomenclature and has been a source of major contention between the Parties. A river called Maiteb meets the Setit at Point 3 (see Map 2, p. 14), about 20 km east of Khor Um Hagar (Point 2). Another river, flowing into the Setit about 89 km east of Khor Um Hagar, is on some maps also identified as "Maetebbe"/"Maeeteb" (Point 4). On some maps, another river, identified as the Maiten (sometimes "Mai Ten" or "Maitenne"), meets the Setit 25 km further to the east (Point 8). Once the point on the Setit where it is met by the correct river is identified, both Parties are agreed that the boundary runs in a generally northeastwards direction to the confluence of the Mareb and the Mai Ambessa (Point 9); however, Ethiopia contends that the boundary runs first to the headwaters of the Maiteb and only from there does the boundary run in a straight line to the northeast.

2.22 Although there are considerable disparities between the maps that show this part of the Setit, the line of the river runs from the western terminus of the boundary in a generally west-east direction. At about 37° 04' E longitude, however, there is a long northwards-pointing hump or curve in the river that extends as far as 37° 26' E, at which point, having reached the same latitude at which the curve started, the line of the river continues in a southeasterly direction.

2.23 Between the western terminus (Point 1, at about 36° 34' E longitude) and 37° 40' E longitude, the right bank of the Setit is joined by a number of tributaries of which the following (going from west to east) may be mentioned: the Maiteb (Point 3), the Sittona (Point 4), the Meeteb (Point 5), the Tomsa (Point 6) and the Maiten (Point 8). The locations of the confluences of each of these rivers with the Setit varies in the earlier maps, but has been stabilized in cartographic representations for some ninety years. The name Meeteb, for example, appeared on an 1894 map somewhat to the east of where it appears on later maps, but on

that same map there is no river named the Maiteb. In a sketch of 1900 limited to a short stretch of the Setit, the Meeteb again appeared, in approximately the same location. In later maps of, for example, 1902, 1913 and 1922, there is both a river Maiteb (in the west) and a river Meeteb (in the east).

2.24 The determination of the river to which the Treaty refers as joining the Setit and as marking the point at which the boundary turns towards the northeast is to be decided in accordance with the 1902 Treaty and applicable international law. This will be considered in Chapter V, below.

4) The central sector

2.25 Once the boundary reaches the Mareb at Point 9, it is defined by the 1900 Treaty, which takes the boundary eastwards along the Mareb until Point 11 at which that river is joined by another, the Belesa, flowing from the east, thus following the first part of a line described in the 1900 Treaty as the line "Mareb-Belesa-Muna."[2] There is no dispute between the Parties about the line in this section. Their differences begin as the line moves upstream the Belesa.

2.26 As already stated, the 1900 line was traced on a map annexed to the Treaty. Both Parties agree that that map, being "annexed" to the Treaty, is a visual or linear exposition of its content and has the same force as the Treaty. One would expect, therefore, to look first to that map for assistance in defining the line in this section. The difficulties, recognised to differing degrees by both Parties, are that the Treaty map was drawn on a very small scale, 1:1,000,000, and the features marked on it do not correspond exactly with the topography and toponymy appearing in modern maps.

2.27 Nevertheless, Eritrea contends that the Treaty map provides sufficient guidance to enable the Commission to identify each of the disputed components of the Mareb-Belesa-Muna line. Thus, Eritrea points to the fact that the branch of the Belesa that the Treaty map shows as being connected by a land link to the Muna corresponds with the western branch of that river as it appears on the 1894 map that formed the basis of the Treaty map, that that line turns to run southwards and then leaves the Belesa by a small unnamed stream to run almost due eastwards over the watershed to join the Muna as it rises on the eastern side of the watershed (Point 20). It then continues again in a roughly easterly direction until it meets the Endeli at Massolae (Point 27).

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[2] The part of the 1900 Treaty line that runs from Tomat to Todluc on the Mareb can for all practical purposes be disregarded, because in the 1902 Treaty the reference to that part was dropped and was replaced by the line to the Mareb along the Setit and Maiteb that has already been mentioned. The Commission's task in this sector is limited to identifying the line of the "Mareb-Belesa-Muna."

2.28 In marked contrast, Ethiopia's interpretation of this part of the 1900 Treaty involves three elements.

2.29 The first contention in the Ethiopian approach is that the formula Mareb-Belesa-Muna is to be taken as intended to reflect the *de facto* administrative division between the districts of Acchele Guzai in the north, under Italian control, and Agame in the south, under Abyssinian control. Thus, for Ethiopia, the task of the Commission is not so much to interpret and apply in a geographical sense the Treaty's Mareb-Belesa-Muna formula as it is to determine the actual division at the time between Acchele Guzai and Agame.

2.30 The second element in the Ethiopian approach involves a comparison between the map annexed to the 1900 Treaty and a modern map based on satellite imaging. Ethiopia contends that the former does not accurately represent the relevant geography. In particular, the depiction of the rivers on the 1900 map is not consistent with the rivers as they appear on the modern map.

2.31 The third element involves the assertion that the names "Belesa" and "Muna" do not describe relevant rivers in the region. Ethiopia names the western branch of the "Belesa" the "Rubai Daro" and the eastern "the Mestai Mes," the latter being joined by the "Sur." The name "Berbero Gado" is given to the river that the 1900 map calls the "Muna." Indeed, Ethiopia maintains that there was no "Muna" identifiable in 1900 at the location at which the 1900 Treaty map places it or, indeed, at all. Ethiopia further contends that the Berbero Gado really forms part of a larger river system, the Endeli, whose source lies somewhat further to the north; that that river formed the boundary between Acchele Guzai and Agame; and, therefore, that it was really along the line of that river that the boundary marked "Muna" on the 1900 Treaty map was meant to run.

2.32 This sector, the "Mareb-Belesa-Muna" line, will be considered in Chapter IV, below.

5) <u>The eastern sector</u>

2.33 From the terminus of the central sector defined in the 1900 Treaty the boundary continues southeastwards to the tripoint with Djibouti. This sector is the subject of the 1908 Treaty, which prescribes that the boundary shall run parallel to the coast but sixty kilometres inland from it. The Parties disagree not only as to its starting point but also as to the proper way of drawing such a line and, therefore, as to its eastern terminus. This sector will be considered in Chapter VI, below.

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CHAPTER III – THE TASK OF THE COMMISSION AND THE APPLICABLE LAW

3.1 The task of the Commission is prescribed in Article 4, paragraphs 1 and 2, of the December Agreement as follows:

> 1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.
>
> 2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions ex aequo et bono.

3.2 The Commission must therefore address three elements: (i) the specified treaties; (ii) applicable international law; and (iii) the significance of the reference to the 1964 OAU Summit Resolution.

A. TREATY INTERPRETATION

3.3 Both Parties agree that the three Treaties cover the whole of the boundary between them. The 1900 Treaty covers the central sector; the 1902 Treaty covers the western sector; and the 1908 Treaty covers the eastern sector.

3.4 The meaning of these Treaties is thus a central feature of this dispute. In interpreting them, the Commission will apply the general rule that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Each of these elements guides the interpreter in establishing what the Parties actually intended, or their "common will," as Lord McNair put it in the *Palena* award.[3]

3.5 It has been argued before the Commission that in interpreting the Treaties it should apply the doctrine of "contemporaneity." By this the Commission understands that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed

[3] *Argentina/Chile Frontier Case* (1966), 38 ILR 10, at p. 89 (1969) (hereinafter "*Palena*").

at that time. The Commission agrees with this approach and has borne it in mind in construing the Treaties.

3.6 The role of the subsequent practice or conduct of the Parties has also played a major part in the arguments of both sides. The function of such practice is not, it must be emphasised, relevant exclusively to the interpretation of the Treaties. It is quite possible that practice or conduct may affect the legal relations of the Parties even though it cannot be said to be practice in the application of the Treaty or to constitute an agreement between them. As the Permanent Court of International Justice said in relation to loan agreements which, for present purposes, are analogous to treaties:

> If the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights.[4]

3.7 A more recent illustration of the same point is to be found in the *Namibia* Advisory Opinion of the International Court of Justice, given in 1971. There, the South African Government contended that the resolution of the UN Security Council requesting the Court to give an Advisory Opinion was invalid because two permanent members of the Council had abstained in the vote, and that therefore the requirements of Article 27(3) of the UN Charter that a resolution should be adopted by the affirmative vote of nine members including the concurring votes of the permanent members had not been met. The Court rejected this contention, stating that

> the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions . . . . This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organisation.[5]

3.8 Thus, the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning.

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[4] *Serbian Loans, PCIJ Series A, Nos. 20/21*, p. 5, at p. 38 (12 July 1929).

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971*, at p. 22.

3.9 The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case[6] is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was estopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule – whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first. Likewise, these concepts apply to the attitude of a party to its own conduct: it cannot subsequently act in a manner inconsistent with the legal position reflected in such conduct.[7]

3.10 The possibility that a clear treaty provision may be varied by the conduct of the Parties was also clearly acknowledged in a particularly relevant manner in the award in the *Taba* arbitration between Egypt and Israel.[8] There, the relevant Agreement provided that pillars should be erected at intervisible points along the boundary. The final pillar, which was the one principally disputed between the parties, was constructed at a point which was not intervisible with the preceding pillar. Although the Tribunal acknowledged that the Agreement did not provide for any exception to intervisibility, it nonetheless found that "during the critical period, the location of the pillar had come to be recognized by the Parties and was accepted by them."

3.11 As to the manner in which the parties in that case had "recognised" the location of the pillar, the Tribunal observed:

> . . . where the States concerned have, over a period of more than fifty years, identified a marker as a boundary pillar and acted upon that basis, it is no longer open to one of the Parties or to third States to challenge that longheld assumption on the basis of an alleged error. The principle of the stability of boundaries, confirmed by the International Court of

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[6] *Temple of Preah Vihear (Cambodia* v. *Thailand) (Merits)*, *ICJ Reports 1962*, p. 6 (hereinafter "*Temple*").

[7] See, for example, the views expressed by the International Court of Justice in the *Nuclear Tests Case (Australia* v. *France)*, *ICJ Reports 1974*, p. 253, at pp. 267-268, regarding the legal effect of unilateral declarations.

[8] *Arbitral Award in the Dispute concerning certain Boundary Pillars between the Arab Republic of Egypt and the State of Israel*, 80 ILR 226 (1988), 27 ILM 1421 (1988) (hereinafter "*Taba*").

> Justice . . . ,[9] requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error.[10]

3.12 In approaching its task, the Commission will also bear in mind the following observation of the International Court of Justice in the *Kasikili/Sedudu Island* case:

> In order to illuminate the meaning of words agreed upon in 1890, there is nothing that prevents the Court from taking into account the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the Parties.[11]

3.13 The Commission also recalls the observations, generally pertinent to the interpretation of a boundary treaty, in the *Palena* case:

> The Court is of the view that it is proper to apply stricter rules to the interpretation of an Award determined by an Arbitrator than to a treaty which results from negotiation between two or more Parties, where the process of interpretation may involve endeavouring to ascertain the common will of those Parties. In such cases it may be helpful to seek evidence of that common will in preparatory documents or even in subsequent action of the Parties.[12]

B. APPLICABLE INTERNATIONAL LAW AND THE SUBSEQUENT CONDUCT OF THE PARTIES

3.14 Turning to the requirement in Article 4, paragraphs 1 and 2, of the December Agreement that the decision of the Commission shall also be based "on applicable international law," the Commission is much assisted by the consideration by the International Court of Justice of a comparable requirement in the *Kasikili/Sedudu* case.[13] In that case, the parties by agreement prescribed that the decision should be made "on the basis of the . . . Treaty . . . and the relevant principles of international law." The Court decided that the words "and the relevant principles of international law" were not limited in their effect to the international law applicable to the interpretation of treaties; they also required the Court to take into consideration any rules of customary international law that might have a bearing on the case, for example, prescription and acquiescence,

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[9] Citing the *Temple* case, *ICJ Reports 1962*, at p. 34.

[10] *Taba*, 80 ILR 226 (1988), 27 ILM 1421 (1988), para. 235.

[11] *Case concerning Kasikili/Sedudu Island (Botswana/Namibia), ICJ Reports 1999*, p. 1060 (hereinafter "*Kasikili/Sedudu*").

[12] *Palena*, 38 ILR 10, at p. 89 (1969).

[13] *ICJ Reports 1999*, at pp.1101-1102, paras. 91-93.

even if such rules might involve a departure from the position prescribed by the relevant treaty provisions. Thus the Court accepted the possibility that an attribution of territory following from its interpretation of the relevant boundary treaty could be varied by operation of the customary international law rules relating to prescription. As it turned out, the Court found in that case that there was insufficient prescriptive conduct to affect its interpretation of the treaty. But what matters for present purposes is that the Court read the applicable law clause before it as including recourse to such rules of customary international law.

3.15 The Commission reaches the same conclusion as the International Court of Justice. It does not read the reference to "applicable international law" as being limited to the law relating to the interpretation of treaties. Thus it finds itself unable to accept the contention advanced by Ethiopia that the Commission should determine the boundary exclusively on the basis of the three specified Treaties as interpreted in accordance with the rules of international law governing treaty interpretation. The Commission considers that it is required also to apply those rules of international law applicable generally to the determination of disputed borders including, in particular, the rules relating to the effect of conduct of the parties.

3.16 In the present case, the conduct of the Parties falls into three broad categories: maps; activity on the ground tending to show the exercise of sovereign authority by the Party engaging in that activity (*effectivités*); and a range of diplomatic and other similar exchanges and records, including admissions before the Commission, constituting assertions of sovereignty, or acquiescence in or opposition to such assertions, by the other Party.

1) Maps

3.17 The Commission has been presented with an abundance of maps put in evidence by the Parties, consisting of map atlases comprising 156 maps (Eritrea, Memorial), 25 maps (Ethiopia, Memorial), 30 maps (Eritrea, Counter-Memorial), 57 maps (Ethiopia, Counter-Memorial), and 13 maps (Eritrea, Reply) – a total of 281 maps. In addition, Eritrea submitted a full copy of an Ethiopian volume of some 150 pages entitled "Atlas of Tigray." As is often the case in circumstances such as those facing the Commission, many maps are in effect copies of other, earlier maps. While adding to the apparent number of different maps, they do not in substance do so – except as possibly showing a consistent course of conduct by a Party. The number of what may be regarded as original maps is thus more limited than the long list of maps presented by the Parties would suggest. Allowing for this, a realistic total is in the region of 250 maps. Also, the Parties' pleadings included copies of a number of lesser maps and figures that were not included in their map atlases.

3.18 The Commission is aware of the caution with which international tribunals view maps. Those which are made authoritative by, for example, being annexed to a

treaty as a definitive illustration of a boundary delimited by the treaty, are in a special category, since they "fall into the category of physical expressions of the will of the State or States concerned."[14] The Treaty map annexed to the 1900 Treaty is such a map.

3.19 The Commission is also aware that maps, however informative they may appear to be, are not necessarily accurate or objective representations of the realities on the ground. Topography is dependent upon the state of knowledge at the time the maps were made, and particularly with older maps this may have been inadequate. When man-made features are superimposed, such as places of habitation or territorial limits, there is room for political factors to play a part. Particularly in the case of maps portraying a boundary which is in the interests of the Party responsible for the map, the possibility exists that they are self-serving.

3.20 These cautionary considerations are far from requiring that maps be left out of account. As already noted, where a map is made part of a treaty then it shares the legal quality of the treaty and is binding on the parties. That is the case with the map annexed to the 1900 Treaty (see para. 4.8, below). It needs to be scrutinised with the greatest care, since the detail it contains can greatly assist in giving specific meaning to an otherwise insufficiently detailed verbal description.

3.21 The effect of a map that is not part of a treaty will vary according to its provenance, its scale and cartographic quality, its consistency with other maps, the use made of it by the parties, the degree of publicity accorded to it and the extent to which, if at all, it was adopted or acquiesced in by the parties adversely affected by it, or the extent to which it is contrary to the interests of the party that produced it. A map that is known to have been used in negotiations may have a special importance. A map that emanates from third parties (albeit depending on the circumstances), or is on so small a scale that its import becomes a matter for speculation rather than precise observation, is unlikely to have great legal or evidentiary value. But a map produced by an official government agency of a party, on a scale sufficient to enable its portrayal of the disputed boundary area to be identifiable, which is generally available for purchase or examination, whether in the country of origin or elsewhere, and acted upon, or not reacted to, by the adversely affected party, can be expected to have significant legal consequences. Thus a State is not affected by maps produced by even the official agencies of a third State unless the map was one so clearly bearing upon its interests that, to the extent that it might be erroneous, it might reasonably have been expected that the State affected would have brought the error to the attention of the State which made the map and would have sought its rectification.

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[14] *Case concerning the Frontier Dispute (Burkina Faso* v. *Mali), ICJ Reports 1986*, at p. 582, para. 55 (hereinafter "*Frontier Dispute*").

3.22 In these instances it is not the maps "in themselves alone" (to use the language of the Chamber of the International Court of Justice in the *Frontier Dispute* case[15]) which produce legally significant effects, but rather the maps in association with other circumstances. A map *per se* may have little legal weight: but if the map is cartographically satisfactory in relevant respects, it may, as the material basis for, e.g., acquiescent behaviour, be of great legal significance.

3.23 The Commission must also address another aspect of map evidence which played a large part in the arguments of the Parties. It was contended that a boundary can be determined by reference to its "signature" – that is, its general shape, silhouette, contour or outline on maps, as distinct, that is, from its particular details.

3.24 The Commission does not reject this contention, but approaches it with caution. It is of the nature of boundaries that they need to be geographically specific. A general shape may not have that degree of specificity, or be capable of interpretation with sufficient clarity or definition, to allow for its accurate transposition to maps of a suitably large scale. It is not enough to demonstrate that the general shape of the boundary slopes in a certain direction, or in places rises, falls or curves. Those slopes, ascents, declines and curves must identify with sufficient clarity particular geographic features which are relevant to the course of the boundary. But if a general shape is sufficiently clear and specific, and is both distinctive in itself and depicted with clarity in that distinctive form on a range of maps in a consistent, or near consistent, manner, particularly on maps published or used by both parties in a dispute, the Commission must attribute to such a general shape the appropriate legal consequences. Such maps may indicate a general awareness and acceptance of the line prescribed in a boundary treaty and the approximate location of that line. However, the effect of such maps will be less in a situation where there is annexed to the treaty an illustrative map that forms part of it than in cases where there is no such map.

3.25 The Commission also notes the distinction that may be drawn between establishing a boundary by reference to such a "signature" and confirming by such means a boundary which has been established in other ways. There is also a distinction to be drawn between reliance on such means to establish a boundary in a particular location, and reliance on them negatively so as to demonstrate that a boundary does not exist somewhere else. A "signature" being relied on in either a confirmatory or a negative role may be both less clear and less specific than a signature that is relied upon to establish a boundary, yet still have the effects referred to. It is also important to bear in mind that though a series of maps may show a consistent, or possibly inconsistent, treatment of one section of the boundary, this may not be so in relation to another part. The map evidence has to be considered separately in relation to each particular part of the boundary. Also, in considering the general significance of map evidence, if that evidence

[15] *Ibid.*, at p. 583, para. 56.

is uncertain and inconsistent, its value will be reduced in relation to the endorsement of a conclusion arrived at by other means, as also its support for any alteration of a result reached on the basis of textual interpretation.[16]

3.26 Another aspect of the map evidence to which the Parties devoted argument was the effect of so-called "disclaimers" which appear on a number of maps. The wording of these disclaimers varies. For example, some state "[t]his map must NOT be considered an authority on the delimitation of international boundaries"[17] or "[b]oundary representation is not necessarily authoritative."[18] A map prepared by the Geographer of the Department of State of the United States stated that it was "not necessarily authoritative." Maps prepared by the United Nations often state that they do not imply "official endorsement or acceptance by the UN." A number of Ethiopian maps state that "[t]he delimitation of international boundaries shown on this map must not be considered authoritative."

3.27 The question that requires consideration is to what extent, if any, such disclaimers may affect the evidential quality of the maps. The Commission is of the view that such disclaimers do not automatically deprive a map of all evidential value. The map still stands as an indication that, at the time and place the map was made, a cartographer took a particular view of the features appearing on the map. The disclaimer is merely an indication that the body making the map (or its Government) is not to be treated as having accorded legal recognition to the boundaries marked thereon or to the title to territory of the States concerned as indicated by the marked boundary.

3.28 As regards the State adversely affected by the map, a disclaimer cannot be assumed to relieve it of the need that might otherwise exist for it to protest against the representation of the feature in question. Nor does the disclaimer (whatever may be its legal effect on the content of the map) neutralize the fact that that State itself published the map in question. The need for reaction will depend upon the character of the map and the significance of the feature represented. The map still stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest. The disclaimers may influence the decision about the weight to be assigned to the map, but they do not exclude its admissibility.

2) *Effectivités*

3.29 As to activity on the ground, the actions of a State pursued *à titre de souverain* can play a role, either as assertive of that State's position or, expressly or

[16] See *Kasikili/Sedudu, ICJ Reports 1999*, p. 1100, para. 87.

[17] British maps, 1942-1946.

[18] A British map of 1997.

impliedly, contradictory of the conduct of the opposing State. Such actions may comprise legislative, administrative or judicial assertions of authority over the disputed area. There is no set standard of duration and intensity of such activity. Its effect depends on the nature of the terrain and the extent of its population, the period during which it has been carried on and the extent of any contradictory conduct (including protests) of the opposing State. It is also important to bear in mind that conduct does not by itself produce an absolute and indefeasible title, but only a title relative to that of the competing State. The conduct of one Party must be measured against that of the other. Eventually, but not necessarily so, the legal result may be to vary a boundary established by a treaty.

3) Diplomatic and other exchanges tending to evidence admissions or assertions

3.30 The observations by the Commission in paragraphs 3.6-3.13, above, are as applicable to conduct evidencing a departure from or a variation of a treaty in the context of "applicable international law" as they are to the actual interpretation of the treaty itself. No more need be said about such conduct except that it may extend also to assertions or admissions made in the course of the proceedings before a tribunal.

C. Relevance of the Reference to the 1964 OAU Summit Declaration

3.31 Reference needs also to be made to the wording of Article 4, paragraph 1, of the December Agreement, which contains the following phrase:

> . . . the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

3.32 On 10 June 1998 the Heads of State and Government of the Organization of African Unity submitted to the Parties for their consideration the elements of a "Framework Agreement" based on three principles of which the third was "respect for the borders existing at independence as stated in the Resolution of the OAU Summit in Cairo in 1964."

3.33 This Framework Agreement was accepted by the Parties. On 14 September 1999, following further consideration of the dispute within the OAU and the UN Security Council, "Technical Arrangements for the Implementation of the Framework Agreement" were agreed by the Parties. Again, the principle of respect for the borders existing at independence was reaffirmed.

3.34 Prior to the adoption of the Technical Arrangements, Ethiopia requested a series of clarifications relating to them, including one regarding the law to be applied to the settlement of the dispute. Two of the clarifications stated as follows:

> A.1.1. In this regard, it is useful to underline that the preamble to the Framework Agreement sets forth both a principle and an approach.
>
> A.1.2. The principle set forth is that of "the respect for the boundaries existing at independence," as stated in the [1964 OAU Resolution] . . . .

3.35 The Parties committed themselves to these principles in the Agreement on the Cessation of Hostilities concluded between them on 18 June 2000, and reaffirmed their respect for the principle of respect for the borders existing at independence appears in Article 4, paragraph 1, of the December Agreement.

3.36 In the light of the manner in which the text of the provision in the December Agreement developed, the Commission does not read the terms of Article 4, paragraph 1, as altering the general direction given to it in paragraph 2 of the same Article and examined above. However, the Commission does see the provision as having one particular consequence. It is that the Parties have thereby accepted that the date as at which the borders between them are to be determined is that of the independence of Eritrea, that is to say, on 27 April 1993. Developments subsequent to that date are not to be taken into account save in so far as they can be seen as a continuance or confirmation of a line of conduct already clearly established, or take the form of express agreements between them.

D. The Present Decision Does Not Deal with Demarcation

3.37 The task of the Commission extends both to delimitation and to the making of arrangements for the expeditious demarcation of the boundary (Art. 4, paras. 2 and 13). The latter aspect of the Commission's work is not covered by the present decision and will be the subject of the next phase of its activities.

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CHAPTER IV – THE SECTOR COVERED BY THE 1900 TREATY (CENTRAL SECTOR)

A. THE INTERPRETATION OF THE 1900 TREATY

4.1 The Commission will begin its consideration of the sector of the border covered by the 1900 Treaty by interpreting the Treaty itself and the annexed Treaty map. The outcome of this interpretation will determine the border in this sector, subject only to two important qualifications flowing from the subsequent conduct of the Parties and an admission made by one Party during the proceedings.

4.2 Article I of the Treaty (in English translation) provides:

> The line Tomat-Todluc-Mareb-Belesa-Muna, traced on the map annexed, is recognized by the two Contracting Parties as the boundary between Eritrea and Ethiopia.[19]

Tomat and Todluc are the names of towns; Mareb, Belesa and Muna are references to rivers.

4.3 The line described in Article I delimits the boundary from the frontier with Sudan in the west to a point in the east the exact location of which is a matter of dispute but which, in general terms, is where the Muna in its Treaty sense may be held to end.

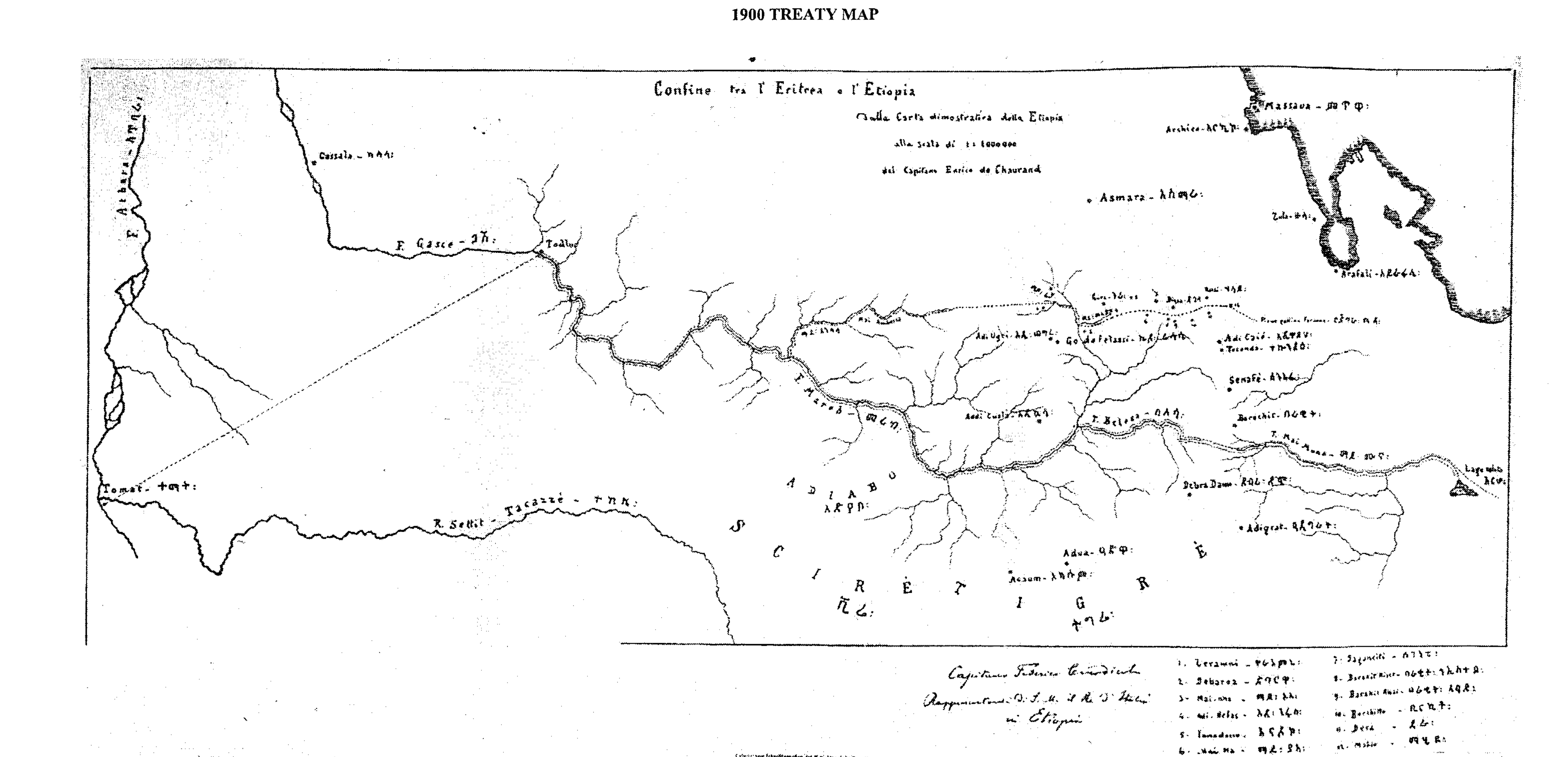
4.4 By the 1902 Treaty (as to which see Chapter V, below), the Parties altered the western part of the boundary. The line from Tomat to Todluc and its continuation along the Mareb to its confluence with the Mai Ambessa (Point 9) was replaced by a line which, coming from the Setit, reached the Mareb at its junction with the Mai Ambessa. Effectively, therefore, after the 1902 Treaty, the boundary defined by the 1900 Treaty dealt only with the central sector, represented by "the line Mareb [effectively from its junction with Mai Ambessa]-Belesa-Muna, traced on the map annexed." It is this line which the Commission is now called upon to interpret and apply.

4.5 In adopting the Mareb-Belesa-Muna line in the 1900 Treaty, the Parties were evidently confirming, in a legally definitive manner, a line that – though not specifically delimited – had been accepted in practice for several years on a *de facto* or provisional basis, and which was identified as a dividing line between

[19] The English translation is that given in Sir E. Hertslet, *The Map of Africa by Treaty*, Vol. 2, p. 460 (3d ed., 1967). The Amharic text is similar. No difference between the texts is alleged by the Parties to be material to the course of the boundary in this sector. The Treaty itself provides that it is written "in the Italian and Amharic languages, both to be considered official save that in case of error in writing the Emperor Menelik will rely on the Amharic version."

Map 5

1900 TREATY MAP



the two regions of Acchele Guzai (falling within Eritrea) and Agame (falling within Ethiopia).

4.6 Thus the 1896 armistice arrangement was followed by the Italy-Abyssinia Peace Treaty of 26 October 1896.[20] Article IV of that Treaty provided that the Parties would by agreement fix the definitive frontiers between them within one year, and that

> [u]ntil these frontiers have been thus fixed, the two Contracting Parties agree to observe the *status quo ante*, strictly prohibiting either of them from crossing the provisional frontier, determined by the courses of the Mareb, Belesa, and Mouna Rivers.[21]

4.7 Ethiopia and Italy soon began their negotiations for a definitive frontier. Emperor Menelik of Ethiopia at first sought a frontier considerably to the north of the Mareb-Belesa-Muna line, but eventually agreed in 1900 to keep to that line (in exchange for a payment of 5,000,000 lire, apparently for forgoing a more extensive claim). Although the Parties failed to conclude the definitive frontier agreement within the one year envisaged by Article IV, they did conclude the necessary agreement on 10 July 1900.

4.8 The 1900 Treaty described the boundary in economical language, referring only to three river names, "Mareb-Belesa-Muna." As a delimitation which could form the basis for a demarcation of the boundary on the ground, it fell short of a desirably detailed description, particularly in the light of the uncertain knowledge at the time concerning the topography of the area and the names to be given to geographical features. Rivers, in particular, were frequently given different names along different stretches of their courses. The Parties, however, clarified their agreement by adding to the brief verbal description of the boundary the words "as traced on the map annexed." That map, which will be referred to as the "Treaty map," is accordingly of critical importance for the determination of the course of the boundary. A copy of that map appears as Map 5, on page 32. It cannot be regarded as just offering a general indication of the course to be followed by the boundary. By virtue of the words the "line . . . traced on the annexed map," the map contained the Parties' agreed delineation of the boundary that they intended to adopt. Although the Treaty map consists primarily of the depiction of a line, with a very few names identifying some locations near that line, the Commission considers that the same rules and principles of interpretation must be applied to the map as apply to the words used in the Treaty.

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[20] Treaty between Italy and Abyssinia, signed at Addis Ababa, 26 October 1896, Hertslet, note 19, above, at p. 458.

[21] The Commission's translation.

CHAPTER IV – 1900 TREATY (CENTRAL SECTOR)

4.9 In order to understand and properly assess the Treaty map, it is necessary to say something about its background. At the end of the nineteenth century, there were not many published maps of the relevant area of sufficient detail or reliability. The principal map was prepared by an Italian geographer, Captain Enrico de Chaurand, and published in 1894. It was not the result of personal exploration and recording by de Chaurand, but was rather a compilation of information from many sources. In some areas the map provided detailed information, but if the sources available to de Chaurand did not cover a particular area, then that deficiency was perforce reflected in a corresponding thinness of relevant detail in his map. Despite its early date and certain inaccuracies which are now apparent, de Chaurand's map can be regarded overall as providing reasonable coverage on a consistent scale. The Treaty map states that it was based on de Chaurand's map of the Tomat-Todluc-Mareb-Belesa-Muna area, and it is apparent that the Treaty map was in fact a tracing or other direct copy of the relevant part of the de Chaurand map, omitting certain features so as to give prominence to the features most relevant to the 1900 Treaty line. Depictions on de Chaurand's map are therefore directly relevant to an understanding of the Treaty map.

4.10 The Treaty map depicts the boundary by a single dotted red line across the overland stretch from Tomat to Todluc, and then by a double dotted red line along each bank of the rivers called Mareb, Belesa and Muna (including the overland stretch between the headwaters of the Belesa and Muna), until at its eastern extremity the boundary reaches the Salt Lake. After that it continues as a single dotted red line in a southeasterly direction for a short distance along the northeastern shores of that lake.

1) <u>The Mareb River</u>

4.11 Starting at the junction of the Mareb and Mai Ambessa (Point 9), the boundary following the course of the Mareb eastwards and upstream to its junction with the Belesa (Point 11) is not in dispute. The identity and course of the Mareb, the location of its confluence with the Mai Ambessa, and the location of its confluence with the Belesa, are all agreed by the Parties. The only matter of uncertainty in this stretch of the river, as with all rivers, may be the precise location of the boundary within the river. The boundary within rivers is dealt with in Chapter VII, below.

2) <u>The Belesa River</u>

4.12 Before considering the depiction of the Belesa on the Treaty map, it is necessary to make three observations. First, the description of the boundary is complicated by the fact that the boundary is defined in terms that take it from west to east, while the waterways which form the boundary in the western part of this sector flow from east to west.

CHAPTER IV – 1900 TREATY (CENTRAL SECTOR)

4.13 Second, although the actual shape of the Belesa river system can be seen on modern mapping not to be exactly the same as depicted on the Treaty map (and on de Chaurand's map), the general similarity of the Treaty map's depiction with what is known today of the Belesa's course is evident.

4.14 Third, the Parties are in dispute about the appropriate river nomenclature for various stretches of relevant waterways, and in particular the Belesa and the Muna. Both Parties acknowledge that names given to rivers in this region vary. This is particularly the case with older maps and documentary references issued at a time when geographical knowledge of the area was relatively limited. The Commission will note such problems of nomenclature as and when it comes to particular rivers which give rise to them, and will adopt the nomenclature which seems appropriate in the context and which designates its subject with maximum clarity. What matters most is the identification of what the Parties intended in referring to a watercourse as a feature in the landscape, rather than its name. If the name used is incorrect, then it is the Parties' intentions with respect to the reality on the ground rather than the name which is decisive. The Parties agree on the relevant verbal description, the "Belesa-Muna" line, but do not agree where the line which those words are intended to describe actually runs. Moreover, while they appear to agree that the Mareb-Belesa-Muna line laid down in the 1900 Treaty was supposed to represent a *de facto* line which had been observed for a number of years, they do not agree where that *de facto* line ran.

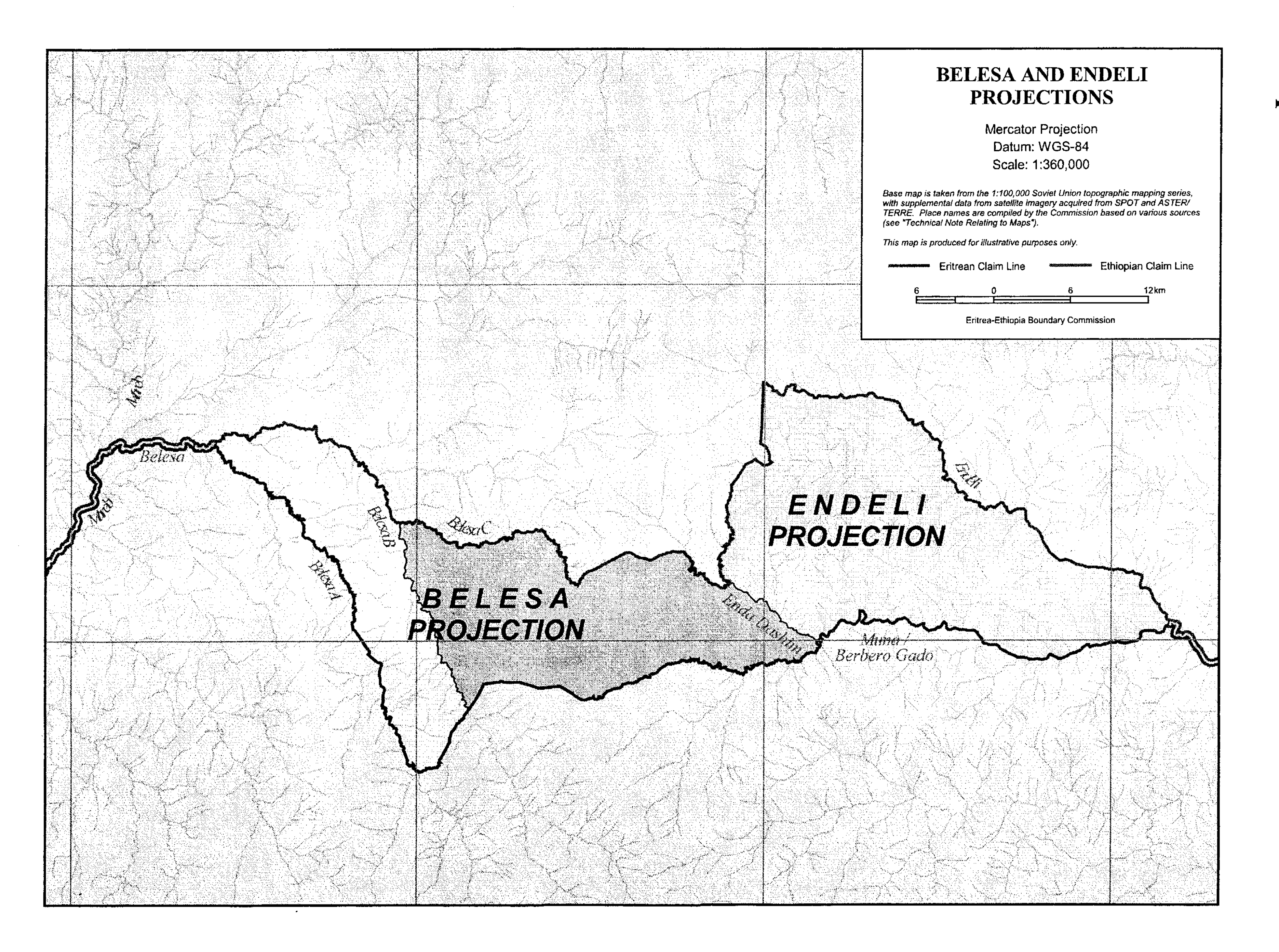
4.15 At the confluence of the Mareb and the Belesa (Point 11), about which point there is no dispute between the Parties, the Treaty map shows the boundary as turning eastwards and following the course of the Belesa upstream. Just to the east of the confluence, the river is clearly marked "T. Belesa," followed by its Amharic equivalent.

4.16 Close to this confluence, the Treaty map shows a small unnamed tributary flowing into the Belesa from the south. Otherwise the map shows the Belesa as continuing in a generally easterly direction until, at Point 12 just below the space between the first two letters of the Amharic version of "T. Belesa," the Belesa appears to unite two upstream rivers: one flows in from the south, while the other flows in from a generally easterly direction. Modern mapping shows two rivers in those places. The Commission will refer to these two rivers, each put forward by one of the Parties as its "Belesa" as, respectively, "Belesa A" (flowing in from the south) and "Belesa B" (flowing in from the east).[22]

4.17 It is noteworthy that the Treaty map does not show any tributary flowing into the Belesa from the north in the stretch between its confluence with the Mareb (Point

[22] The Parties have expressed differing views as to which of these tributaries was the smaller or larger. No detailed evidence on this point was put to the Commission. However, the Commission does not regard the question as material. The Treaty map depicts a particular watercourse as the boundary, without reference to whether it was the smaller or larger tributary.

Map 6



BELESA AND ENDELI PROJECTIONS
Mercator Projection
Datum: WGS-84
Scale: 1:360,000
Base map is taken from the 1:100,000 Soviet Union topographic mapping series, with supplemental data from satellite imagery acquired from SPOT and ASTER/TERRE. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only.
Eritrean Claim Line
Ethiopian Claim Line
6 0 6 12km
Eritrea-Ethiopia Boundary Commission
ENDELI PROJECTION
BELESA PROJECTION
Endeli
Muna / Berbero Gado
Belesa C
Belesa B
Belesa A
Belesa
Mareb

11) and the point at which the Belesa A and Belesa B merge (Point 12). In fact, there is a substantial tributary in this sector that flows into the Belesa from the northeast: it is clearly shown and named "T. Tserona" on the de Chaurand map, joining the Belesa at a point about one-third of the way between Points 11 and 12.

4.18 Eritrea argues that the tributary shown on the Treaty map as flowing into the Belesa from the east (which the Commission has designated the Belesa B) was intended to represent the Tserona. This would leave Belesa A as the Belesa named in the 1900 Treaty. Eritrea has drawn attention to a number of maps that have adopted this nomenclature, and which Eritrea characterises as the "standard nomenclature." Ethiopia considers the Tserona to be irrelevant to the boundary (for which reason it contends it was omitted from the Treaty map), leaving Belesa B and Belesa A as the two Belesa tributaries shown on the Treaty map, and considers Belesa B to represent the course of the boundary as shown on that map.

4.19 The Parties' contentions place in dispute sovereignty over a considerable tract of territory comprising roughly two sections: one is the area between Belesa A and Belesa B (shaded yellow on Map 6, p. 36); the other, adjoining it, extends eastward from Belesa B and is bounded, on the north, by the tributary that joins Belesa B from the east at Point 13 (which for convenience will be called "Belesa C") and, on the south, by the link in the Eritrean claim line, partly land and partly river, between Belesa A and one of the headwaters of the Muna (shaded pink on Map 6, p. 36). This tract will, for convenience, be referred to as "the Belesa projection."

4.20 Eritrea's contention that the boundary follows what the Commission is referring to as the Belesa A cannot be reconciled with the indication of the course of the boundary as marked on the Treaty map. On that map itself, the name "T. Belesa" (and its Amharic equivalent) are written as covering both the main stretch of the Belesa and its extension along Belesa B; and, being so written, it must be taken as showing what the Parties intended when using the word "Belesa" in the 1900 Treaty.

4.21 Furthermore, the Eritrean choice of Belesa A as the intended boundary line would not attribute a role to Belesa C, which the Treaty map clearly utilizes as part of the boundary. Nor can Belesa C be confused with any other tributary flowing into Belesa A at about the latitude shown on the Treaty map.

4.22 The Commission concludes that the omission from the Treaty map of the Tserona as shown on the de Chaurand map was deliberate, and that the depiction of the boundary as following the Belesa eastwards to Belesa B was deliberate and is so shown on the Treaty map.

4.23 Following Belesa B upstream (eastwards) from Point 12, the Treaty map shows this branch of the Belesa as following a course describing a rough quarter circle.

Just at the southeastern end of that quarter circle, the Treaty map shows a small tributary flowing into Belesa B from the east. Though this small tributary is not named on the Treaty map (or on the underlying de Chaurand map), the location of its confluence with the Belesa B is shown on the Treaty map to be (as measured on the underlying de Chaurand map) about 20 km southwest of Senafe, and about 15 km WSW of Barachit. Modern mapping confirms that the tributary corresponding to these requirements, which Ethiopia identifies as the Sur, is Belesa C. The Commission concludes that, as a matter of treaty interpretation, this unnamed tributary marked on the Treaty map is the continuation of the boundary line as it runs towards one of the headwaters of the Belesa.

4.24 The Treaty map depicts the Belesa C as a short single blue line of about 8 km in length. On modern mapping, the network of small headwater streams feeding the Belesa C is complex. These various smaller tributaries and streams are not depicted on the Treaty map, which instead marks the boundary with a double row of red dots going overland until it meets one of the headwaters of the Muna. For this overland stretch, the boundary is depicted as running in an ESE direction. The Commission finds that the Treaty boundary follows the line of the most southerly of the small tributaries of the Belesa C. That tributary, on modern mapping, has its source close to the modern town of Zalambessa.

3) The upper reaches of the Muna and the overland link between the Belesa and the Muna

4.25 Both Parties accept that the Treaty boundary follows the line "Belesa-Muna" and that those names refer to rivers flowing in opposite directions from a watershed divide lying between their headwaters. Consequently, the Parties acknowledge, as they must, that the Treaty reference to the boundary in this sector as following two rivers cannot be literally correct. There must be a short overland stretch of boundary between and joining the headwaters of the two relevant rivers. The Commission has already identified in paragraphs 4.22-4.24, above, the Belesa selected by the Parties in the Treaty. It is now necessary to consider the overland Belesa-Muna sector.

4.26 This overland sector cannot be established without first locating the Muna to which the Treaty intended the link to run. The Parties disagree as to the identity of the Muna.

4.27 Ethiopia has identified a discrepancy between, on the one hand, the Treaty map and the underlying de Chaurand map and, on the other hand, what is shown on modern mapping. The Treaty map (and the de Chaurand map) shows the river designated as the Mai Muna ("Maj Mena" on de Chaurand's map) flowing in a relatively straight line in a generally ESE direction from its headwaters south of Barachit until it reaches what the de Chaurand map names as the Endeli and Ragali. But neither the Treaty map nor the de Chaurand map shows any tributary flowing from the north or northwest into the central part of the Mai Muna. There is, however, an additional and substantial river, with its headwaters near the town

of Senafe, that flows eastwards and is called the Endeli. The lower reaches of this river are already depicted on de Chaurand's map. This much larger Endeli is the major river into which the Muna flows at a point (if the Upper Endeli were on the Treaty map) just beneath the hyphen below the first symbol of the Amharic texts of the name "T. Mai Muna" (Point 27). Nonetheless, both on this map and de Chaurand's map, the river that is, in fact, the Endeli, still carries the name Muna. In that eastern portion, the river, whether called Endeli or Muna, continues to flow in a generally ESE direction until, as it approaches and eventually dries up in the Salt Lake, it is denominated the Ragali.

4.28 The Parties propose very different ways of dealing with the omission of the upper reaches of the Endeli from the Treaty map (and from the underlying de Chaurand map). Ethiopia notes that the Treaty map contains inconsistent indications: on the one hand, that the river constituting the boundary is the northernmost branch of the river system depicted on the map but, on the other, that that northernmost branch is depicted as having its source south of Barachit. Ethiopia contends that the northernmost branch, although named "Muna" on the Treaty map, is the stream which is in fact the northernmost and is now known to be the upper reaches of the Endeli. Thus, Ethiopia maintains, in effect, that the Treaty map, despite naming the boundary river the Mai Muna, must be taken to be referring to the real Endeli further north, while the river depicted in the position of what is named the Mai Muna is in fact another river, called the Berbero Gado. Given this disagreement on nomenclature, the Commission will refer to this last river as the Muna/Berbero Gado.

4.29 Ethiopia also draws attention to persistent confusion after 1900 over the location of the river designated "Muna." Thus Ethiopia notes that: (i) Ciccodicola, the principal Italian negotiator, recorded in 1903 that "the Endeli, a tributary of the Muna, [had been] designated to him [i.e., Emperor Menelik] as waters of the Muna," and that it was on that basis that the Emperor had signed the 1900 Treaty; (ii) in January 1904 the Italian Governor of Eritrea noted in his diary that "[o]ur mistake is to have confused it [the Muna] with the Endeli," a confusion which Ethiopia suggests shows that the Parties intended the boundary to follow the northernmost branch of the Endeli system, thereby leaving the Irob district to Ethiopia; (iii) the Italian Boundary Commission of 1904 (the "1904 Commission")[23] was unable to find a river clearly identified as the "Muna," observing that it was referred to by many other names – but not including "Muna" – in various stretches along its course, and expressed considerable uncertainty in its attempt to identify the Berbero Gado as the river corresponding to the "Muna"; and (iv) an Italian writer, Captain Mulazzini, in "Geography of the Colony of Eritrea," in 1904 described the boundary (going westwards) as following the upper Endeli to just short of Senafe and then turning sharply southeast down to "the Mai Muna, also known as the Ruba Enda Dascin,"[24]

[23] See Appendix A to this Decision, beginning at p. 107.

[24] Spelling as in the original.

which it crosses and then continues towards the Belesa and the Mareb – thus identifying a line broadly consistent with this part of Ethiopia's claim line. Indeed, Ethiopia even argues that at the time of the Treaty, there was no river in the area known as the Muna.

4.30 By reference to these considerations, Ethiopia maintains that the land link between the Belesa and the Muna follows a line markedly different from that depicted on the Treaty map. The boundary having followed the course of the Sur (Belesa C) to within about 2 km of Zalambessa would, in the Ethiopian contention, then turn north eastwards to pass overland in a straight line across the Zalambessa-Barachit road. About one kilometre beyond the road, it would rejoin a waterway (unnamed) leading into the Enda Dashim. It would then turn northwards and pass, partly by waterways, partly overland, to the upper waters of the Endeli[25] and would then follow the course of that river southeastwards to Rendacoma, being joined some 44 km east of Zalambessa by the waters of the Muna (Berbero Gado).

4.31 Eritrea has maintained, in effect, that: the Treaty map identifies the "T. Mai Muna," with its headwaters south of Barachit, as the boundary; there is a river of that name in that place (as shown on the underlying de Chaurand map as well as on other maps); and therefore that river constitutes the boundary in accordance with the 1900 Treaty.

4.32 These different submissions relate to an area within the district of Irob, a roughly triangular area bounded to the west by the generally north-south link between the upper waters of the Endeli and the upper waters of the Enda Dashim, to the north by the Endeli upstream from its confluence with the Muna and, to the south, by the Muna/Berbero Gado. For convenience, the Commission will refer to this area as the "Endeli projection" (shaded blue on Map 6, p. 36). Ethiopia regards the Irob Wereda (i.e., administrative subdivision) as part of Agame, which is a political subdivision of the Ethiopian province of Tigray; Eritrea denies that Irob is part of Agame.

4.33 The Commission has already noted that the naming of rivers in this general region is not without its problems (para. 4.14, above). What matters is what the Parties intended, of which the principal evidence is what they said in the Treaty and, more particularly, illustrated in the Treaty map. It is clear that the Parties agreed to a Treaty which referred to the Muna and that the Treaty map depicted a boundary line following a river (designated as the Muna) flowing from south of Barachit and running generally ESE towards the Salt Lake and the Danakil

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[25] There is no clear explanation of why the depiction of the upper reaches of the Endeli was omitted from the de Chaurand map, and thus from the Treaty map based on it. The Commission would, however, observe that in this general area the de Chaurand map contains much less detail than it does in other areas. This may indicate that the sources upon which de Chaurand relied in compiling his map provided only incomplete, or little, information for that area.

Depression. That Treaty line must be taken to represent what the Parties intended, particularly since a river of the name (Muna) and in the place shown on the Treaty map was also identified on maps, including the de Chaurand map, known at the time. Moreover, an Endeli was also known at the time, with its upper course more or less correctly depicted on some earlier maps. Had the Parties intended that the boundary should follow the course of that river, they could have said so; alternatively, if they did not know of that river's upper reaches, then they could not have intended the boundary to follow them.

4.34 The fact that the waterway later depicted as the boundary on the Treaty map is shown on the de Chaurand map as "Maj. Mena" and "Endeli" and "Ragali" does not mean that any one of those terms is a synonym for the others. As is common practice, the different names reflect different stretches of the single watercourse. That the Treaty map designated all three stretches as "T. Mai Muna" appears to the Commission merely to have been a matter of simplification and convenience acceptable to the Parties.

4.35 In relation to the "Muna," the Commission notes that the existence of a river of that name was known to the Parties for several years before the conclusion of the 1900 Treaty, as shown by the references to such a river in the armistice arrangement of March 1896 and the Peace Treaty concluded in October that year. Moreover, a river "Muna" was depicted, in the same general area south and southeast of Barachit and flowing generally ESE so as to join the Endeli, on maps in existence when the 1900 Treaty was concluded.[26] These depictions are consistent with the depiction of the "T. Mai Muna" on the Treaty map. The Commission is satisfied that the Parties, in concluding the Treaty and annexing the Treaty map, intended to refer to that river.

4.36 The map may be followed so long as it is not shown to be so at variance with modern knowledge as to render it valueless as an indicator of what the Parties could have intended on the ground. Nor should the Commission be overzealous in attributing far-reaching consequences to relatively minor discrepancies. Overall, despite some inaccuracies and simplifications, the Treaty map is an acceptable indicator of key features, including the location of Barachit, Senafe, Debra Damo and Adigrat, and the flow of rivers in the area between them.

4.37 The Commission can now return to the question of the overland link between the Belesa and the Muna.

4.38 The Commission has already identified the course of the upper part of the Muna. In its upper reaches, the Muna/Berbero Gado is shown on the Treaty map as comprising several small headwater tributaries. The Treaty map, while not

[26] Examples are the de Chaurand map (1894), and the British War Office map of 1884, revised in 1895 (which shows the "Muna" flowing east from the area south of Barachit and joining the Endeli, itself shown as a distinct river flowing southeast from near Senafe).

depicting the several tributaries flowing into the river further downstream, seems carefully to distinguish these headwater tributaries. Indeed it is somewhat more detailed in this respect than the underlying de Chaurand map, suggesting that particular care was taken with this part of the Treaty map. It shows the boundary river as flowing in this headwater area generally from the west. As it goes downstream, it is shown passing a substantial tributary system flowing in from the northwest, then after a short stretch passing another tributary system flowing in from the southwest, while the boundary river itself follows a tributary in between these other tributary systems.

4.39 The tributary depicted on the Treaty map as flowing into the boundary river from the northwest is shown as having headwaters consisting of two small forked tributaries due south of Barachit. It is also shown as flowing into the boundary river some 16 km southeast of Barachit. The only river meeting this description, with its headwaters close to and due south of Barachit, is the river now known as the Enda Dashim. It flows into the Muna/Berbero Gado at about the same position in relation to Barachit, as shown on the Treaty map, as does the tributary of the Muna just mentioned. This identification of the Enda Dashim as a river other than the one which is depicted as the boundary can only mean that the boundary river is the one into which the Enda Dashim flows.

4.40 The upper reaches of the Muna/Berbero Gado are, in reality, more complicated than the single short blue line depicted on the Treaty map sandwiched between the two pecked red lines as marking the boundary. However, the map depicts a boundary which, from the west-east line of the relevant Belesa C headwater slopes in an ESE direction overland to the relevant headwaters of the river designated as the Mai Muna.

4.41 With respect to the Ethiopian contention set out in paragraph 4.28, above, the Commission is unable to read the Treaty as establishing a boundary so at variance with the Treaty map as to involve a longer and less direct overland sector than that which the map shows. The Treaty map does not support any such marked northwards deviation from the generally ESE direction of the Treaty boundary in this area, nor does it support the kind of overland sector which would be needed to link the headwaters of the Belesa C with those of the Endeli. It is also noteworthy that the de Chaurand map depicts Mounts Auda and Silah to the north of the river which it depicts as the "Muna" and which the Treaty map adopted as the boundary line. Those two mountains lie to the north of the Muna/Berbero Gado, but would not lie to the north of a boundary following the upper Endeli.

4.42 The Commission accordingly concludes that as a matter of the interpretation of the Treaty and the Treaty map, the overland link between the Belesa and the Muna proceeds from the headwater of the Belesa C just to the northwest of present-day Zalambessa (Point 19) to one of the headwaters of the Muna/Berbero Gado (Point 20). It then proceeds in a SSE-trending line following the divide between, to the north, the headwaters of the Enda Dashim and, to the south, the

headwaters of the streams flowing southward and then eastward to join the Muna/Berbero Gado at the point where it is also joined by the Enda Dashim (Point 21).

4.43 Below that point, the "Mai Muna" of the Treaty map may be identified with the "Maj Mena" of the de Chaurand map (the river that the Commission is referring to as the Muna/Berbero Gado). This continues in an identifiable course until it joins the Endeli at Massolae at Point 27.

4.44 From Massolae, the Treaty map shows the river, which it still designates the Muna, continuing downstream in a generally ESE direction, its course providing the boundary line. Although the Treaty map identifies the whole length of the watercourse as the "T. Mai Muna" and its Amharic equivalent, it is apparent, from a comparison with the underlying de Chaurand map, that that was a cartographic simplification for the purposes of the boundary Treaty. The de Chaurand map indicates that the "Maj Mena" flows into the Endeli, which in turn flows into a watercourse identified as the Ragali. It is this series of differently named stretches of rivers – from west to east, Muna, Endeli and Ragali – which the Treaty map refers to by the single name "T. Mai Muna."

4) The eastern terminal point of the 1900 Treaty boundary

4.45 The Parties disagree as to where, to the east, the 1900 Treaty boundary line ends. Eritrea has argued that the Muna ends at the confluence with the Endeli (located at the village of Massolae, Point 27) and that therefore that must be the eastern terminal point of the 1900 Treaty line. From this point, Eritrea contends that, to take account of the local geography, the boundary follows the Endeli for a short distance southeast to Rendacoma (where the Endeli turns northeast and becomes the Ragali), and there leaves the river to continue overland southeast to Djibouti. For its part, Ethiopia has argued that the river depicted as the Muna continues as far as the town of Ragali, and that it is therefore there that the terminal point lies.

4.46 The matter is important not only because of the need to know where the boundary established by the 1900 Treaty ends, but also because Article I of the 1908 Treaty makes "the most easterly point of the frontier established by [the 1900 Treaty]" the starting point for the boundary described in that Treaty. The matter can only be resolved in the first place by a careful consideration of the 1900 Treaty map and the topography of the area.

4.47 The Commission finds no support in the 1900 Treaty and its annexed map for a terminus of the 1900 Treaty boundary at Massolae. The designation on the Treaty map of the river named "Muna," and the depiction of the boundary line itself, extend well beyond the location of Massolae. The fact that Massolae may be about 60 km from the coast, and that the 1908 Treaty subsequently required the boundary to follow a line that distance from the coast, does not of itself require that Massolae be regarded as the terminal point of the 1900 Treaty and the starting point of the 1908 Treaty. "Distance from the coast" was not a

consideration relevant to the boundary laid down by the 1900 Treaty. So its use in the 1908 Treaty cannot be related back to the earlier Treaty.

4.48 The 1904 Commission charged with following the border settled by the 1900 Treaty concluded that its own mission terminated at Massolae. There is, however, no basis in the text of Article I of the Treaty or in the Treaty map for the conclusion that the 1900 boundary terminated at Massolae. Moreover, as the Commission notes below (Appendix A, para. A.1), the 1904 Commission was essentially an Italian commission, though with an Ethiopian observer who did not sign the final report, which therefore did not express the shared views of the Parties. While the Commission does not exclude the possible evidential value of the findings of the 1904 Commission insofar as they illuminate the intentions of the Parties with regard to Article I of the 1900 Treaty, it cannot assign decisive weight to those of its observations which are not supported by the provisions of the Treaty. The Commission cannot, therefore, accept Eritrea's contention that the boundary established by the 1900 Treaty terminated at Massolae.

4.49 The designation "Muna" therefore extends beyond Massolae, even though the contemporary and current names distinguished the Muna from the Endeli and, nearer the Salt Lake, the Ragali. The Treaty map clearly identifies as the river which the Parties were calling the Muna the one which continued eastwards and flowed into and terminated in a body of water, designated as the Salt Lake. This lake still exists in the approximate area in which it is depicted on the Treaty map.

4.50 As already stated (para. 4.10, above), the parallel dotted red lines on the Treaty map are clearly intended to mark the boundary and, proceeding, as they do, along each bank, are consistent with the conception of a boundary river. At the eastern end of the Muna, however, the parallel character of the dotted red lines ends. The line along the southern bank of the Muna follows the Muna to the Salt Lake and terminates at the northern apex of the lake. However, the dotted red line on the northern bank of the Muna continues past the apex and the northeast shore of the Salt Lake in a southeasterly direction virtually until the margin of the map.

4.51 The usage adopted in the Treaty map for the overland sector between Tomat and Todluc was also a single dotted line. Despite the use of the double red dotted line in the short overland section joining the Belesa and the Muna, this single red dotted line alongside the Salt Lake may have been intended to indicate the course of an overland boundary continuing generally southeast beyond the point at which the river terminates in the lake. This would have been consistent with the terms of the 1897 *modus vivendi* indicating a *de facto* line which the Parties negotiating the 1900 Treaty could have been expected to have had in mind. Yet the terms of the 1900 Treaty refer only to the Muna watercourse; the depiction of a line in the Treaty map extending alongside the Salt Lake evidently goes beyond the depicted course of the Muna.

4.52 The depiction on the Treaty map shows the final, curved, part of the Muna river system not as a continuous blue line but as a dotted blue line. This is not

explained on the Treaty map, but on the underlying de Chaurand map (which also uses a dotted blue line in this area) the legend explains that for rivers a continuous blue line signifies "di tracciato conosciuto" (i.e., known river course) while a dotted blue line signifies "di tracciato dubbio" (i.e., uncertain river courses). Modern mapping also shows that immediately to the north of the Salt Lake the river system breaks into a filigree network of small channels and streams, with no readily identifiable single and regular river bed.

4.53 In these circumstances, delimiting the boundary in this delta area as the line taken by the Ragali would not be helpful, for there is no single stable watercourse in this network of small and changing streams and channels. The Ragali does indeed flow, on a permanent and stable basis, to a location near the northern limit of the curved stretch of the lower reaches of that river system before flowing through what may be called the Ragali delta on its way to the Salt Lake.

4.54 Accordingly, the Commission has decided that, based on the 1900 Treaty and its map, the eastern end of the 1900 Treaty boundary follows the line of the Ragali as far as Point 29. Beyond that point, the boundary would ordinarily continue to follow the Ragali until it reaches its terminus at the Salt Lake. However, having regard to the delta-like extension of the riverbed and the difficulty of identifying with sufficient certainty the line of the Ragali therein, the Commission determines that the boundary in the delta is constituted by straight lines connecting Points 29, 30 and 31.

5) Object and purpose of the Treaty

4.55 The only express indication given in the Treaty of its object and purpose is contained in its short preamble. This states that the two Heads of State had agreed on the Treaty

> in the desire to regulate the question of the frontier between the Colony of Eritrea and Ethiopia which has remained open since the conclusion of the Treaty of Peace of Addis Ababa of the 26th October 1896.

Although the Parties placed considerable emphasis on the Mareb-Belesa-Muna line as being intended to give effect to a division between the regions of Acchele Guzai (to stay with Eritrea) and Agame (to stay with Ethiopia), the Commission observes that nothing to that effect is said directly in the 1900 Treaty or in the Peace Treaty to which reference is made.[27]

4.56 The Commission is, however, aware that the 1896 armistice between Ethiopia and Italy following the Battle of Adwa provided *inter alia* that there would be a peace treaty, and that until that time the border between Ethiopia and Eritrea "will be maintained at the Mareb, Belesa and Muna, which is the border of the

[27] Indeed, that Treaty is referred to only as the starting point for the period since which "the question of the frontier . . . has remained open."

Agame and Okologezay,"[28] the former being attributed to Ethiopia and the latter to Eritrea. The fact that, in Article IV of the 1896 Peace Treaty, the Parties agreed provisionally to observe the *status quo ante* does not in the Commission's view import into the terms of the subsequent 1900 Treaty a requirement that that Treaty must itself be interpreted as having as its object and purpose the maintenance of the division between Acchele Guzai and Agame. The Commission is of the view that such considerations are too remote from the 1900 Treaty to affect the conclusions to be drawn from the terms of the Treaty read together with its annexed map.

4.57 The Commission observes that, as a general matter, the southern borders of Acchele Guzai extended south towards the Belesa and Endeli river systems. Its southernmost sub-district was Shimezana, with its capital at Senafe. Agame (in Tigray, the northern part of Ethiopia) extended northwards to the Belesa river system, and had its capital at Adigrat. To the east of the Belesa river system, Agame is said by Ethiopia (but denied by Eritrea) to include the region of Irob, lying within the Endeli river system.

4.58 However, those regions seem only to have been areas generally identified by their respective names, but without specific delimitation of their territorial limits. The Parties have produced conflicting evidence as to the geographical limits of Acchele Guzai and Agame as understood in 1900, in particular as regards the district of Irob, in the area north of the Muna/Berbero Gado and south of the upper reaches of the Endeli, i.e., in the Endeli projection. Ethiopia has contended that in 1890 and thereafter Italian officials were seeking to use the Aghir (which flows into the upper reaches of the Endeli) as the line of division between Acchele Guzai and Agame, and that in referring to a "Belesa-Muna" line Italy's reference to the "Muna" as the division between Acchele Guzai and Agame was based on ignorance of local geography and was really intended as a reference for what is now known to be a "Belesa-Endeli" line. However, the Commission observes that the diplomatic exchanges of a decade before the conclusion of the 1900 Treaty were not part of the negotiations for it; moreover, they show that the rivers in question were known at least to Italy in 1890, which suggests that this omission in 1900 was no mere mistake or oversight.

6) <u>Conclusions as to the boundary identified by the 1900 Treaty</u>

4.59 For the reasons set out above, the Commission therefore concludes that the boundary line identified by the 1900 Treaty (as amended by the 1902 Treaty) and subject to the variations that will presently be described, may be defined as a line that, from west to east:

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[28] Eritrean translation. The translation provided by Ethiopia is that until the peace treaty is concluded "the boundary between the Ethiopian Empire and the Eritrean colony will remain to be the Mareb, Belessa and Muna, which will be the boundary between Agamie and Akologuzay." This difference in translation is, in the Commission's view, of no substance.

Map 7

TREATY LINE
As Established by the 1900 Treaty
Mercator Projection
Datum: WGS-84
Scale: 1:360,000
Base map is taken from the 1:100,000 Soviet Union topographic mapping series, with supplemental data from satellite imagery acquired from SPOT and ASTER/TERRA. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only.
Reference Point
4 0 4 8 12 16 km
Eritrea-Ethiopia Boundary Commission
ERITREA
ACCHELE GUZAI
SHIMEZANA
IROB
BADA
GULOMAKHEDA
AGAME
ETHIOPIA
From the confluence of the Mareb and the Mai Ambessa to Point 11, the boundary line follows the Mareb.
11
12
13
19
20
21
27
28
29
30
31
Mareb
Belesa
Belesa A
Belesa B
Belesa C
Tserona
Senafe
Aghir
Barachit
Sebao
Kelloberda
Guna Guna
Monoxeito
Endeli
Alitena
Muna / Berbero Gado
Massolae
Rendacoma
Ragali
Fort Cadorna
Debra Damo
Adigrat
Salt Lake
14°45'
14°15'
39°00'
39°15'
39°30'
39°45'
40°00'
40°15'

(1) starts at the confluence of the Mareb and the Mai Ambessa (Point 9);

(2) then follows the Mareb to its confluence with the Belesa (Point 11);

(3) then follows the Belesa to the confluence of Belesa A and Belesa B (Point 12);

(4) then follows Belesa B to its confluence with Belesa C (Point 13);

(5) then follows Belesa C to the source of one of its headwater streams at Point 19;

(6) then goes overland for a short distance to the source of a headwater stream of the Muna/Berbero Gado at Point 20;

(7) then follows the Muna/Berbero Gado, passing the confluence with the Enda Dashim (at Point 21) until it joins the Endeli at Massolae (Point 27);

(8) then follows the Endeli downstream until it merges with the Ragali at Rendacoma (Point 28);

(9) then follows the Ragali downstream to Point 29; and

(10) then follows the straight lines joining Points 29, 30 and 31.

B. Subsequent Conduct

4.60 The Commission will now examine the subsequent conduct of the Parties with a view to determining whether any such conduct requires it to vary or adjust in any way the boundary based on the interpretation of the Treaty as set out above. In view of the Commission's conclusion that only two aspects of such conduct lead to any modification of the Treaty boundary, the Commission has placed in Appendix A to this Decision its examination of much of the material that it has determined does not affect the situation.

4.61 The question of sovereignty over the Endeli projection and the Belesa projection was much discussed by the Parties. Both contended that their conduct after the conclusion of the Treaty showed that their sovereignty over the relevant areas had been established and had been accepted by the other.

4.62 The Parties presented the Commission with voluminous material detailing the conduct which they regard as supporting their respective positions. This practice consists largely of a variety of administrative acts tending to show the exercise of sovereign authority by the Party performing those acts, a range of diplomatic and other similar exchanges and records as evidence of assertions of sovereignty, or of acquiescence in such assertions by the other Party, and maps. The Commission does not find it necessary to set out in detail its review of this

evidence, and will only examine it in general terms. Some items, though presented at length by the Parties, have been found by the Commission not to affect the delimitation established by the Commission. Those items, some of which also affect the boundary in the western and eastern sectors, are examined in Appendix A.

4.63 The Commission will first consider the evidence of conduct that demonstrates the exercise of sovereignty in a practical way on the ground. At the outset, the Commission must, however, note that in a number of respects it has been hampered by the inability of the Parties to identify with sufficient particularity the location of the places to which they refer. There is no generally agreed map of the area depicting place names with any degree of reliability. The difficulty is exacerbated by the fact that the spelling of place names is often inconsistent, that some places seem to bear different names in different contexts, that some names of places are shared by the names of regions in which those places are located, and that, at times there has been considerable dispute as to the precise location, or even very existence, of named places. In determining the significance of particular incidents it is of course essential that the Commission be aware of precisely where the incidents are said to have occurred, failing which the Commission will be unable to attribute to them any significant weight. In order to review the material presented by the Parties in a manageable way, it will be convenient to consider it by reference to four relevant regions which are the subject of dispute. From west to east these are: the western part of the Belesa projection; the eastern part of the Belesa projection; the Endeli projection; and the area around the eastern terminus of the 1900 Treaty boundary, known to both Parties as the Bada region.

1) <u>The western part of the Belesa projection</u>

4.64 The area now addressed lies between the Belesa A and Belesa B, forming the western part of the Belesa projection (the area shaded yellow on Map 6, p. 36, above).

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.65 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over the localities in question. These activities comprise such matters as the establishment of telephone and telegraph facilities, the holding of elections and the conduct of the independence referendum, the maintenance of local records of such matters as births and deaths, the payment of taxes and financial tribute, the structure of local administration, the regulation of religious and social institutions, the stationing of military and police posts and the conduct of military and police patrols, the regulation of land use, provincial administration, the administration of educational facilities, public health administration, steps for the eradication of malaria, the grant of a mineral concession, and various local acts carried out by the British Military Administration during the period from 1941 to 1952.

(b) *Diplomatic and other similar exchanges and records*

4.66 The Commission has also taken into consideration a number of items from what may be termed the diplomatic or official record. These include the letter of June 1901 from Martini to Ciccodicola, a memorandum written in 1915 by Checchi, Ethiopian protests at alleged Italian encroachments between 1927-1935, the report of April 1933 by the Italian Regional Commissioner, the reports of April and May 1933 by Governor Astuto, an Italian protest at alleged Ethiopian cross-border incursions in 1933, and the incident which occurred in 1934 involving a burial at Chenneto.

(c) *Maps*

4.67 The map evidence is not uniform and consistent. Much of it supports the existence of a Belesa projection and attributes the territory within it to Eritrea. There are, however, significant maps which do not do so, or do so only in part. Moreover, much of the map evidence is on so small a scale, or so devoid of detail, that it can only be treated as ambiguous in this respect.

(d) *Conclusion regarding the western part of the Belesa projection*

4.68 The Commission has carefully weighed the evidence with which it has been presented. For the most part, it finds the evidence to be of mixed quality and to some extent conflicting as regards its significance for territorial sovereignty. In general, therefore, but subject to two important qualifications, which relate to, respectively, the northern and southern sections of this part of the projection, the Commission does not find that the evidence justifies any departure from the boundary line as found by the Commission to result from the 1900 Treaty.

4.69 The qualification as to the northern section relates to Tserona. In its Reply, Ethiopia stated that a number of specific places mentioned by Eritrea as the location of incidents on which Eritrea was relying were irrelevant, since they were in any event mostly in Eritrea. The words used by Ethiopia were that "Fort Cadorna, Monoxeito, Guna Guna and Tserona" were "mostly . . . undisputed Eritrean places." While Monoxeito and Guna Guna are on the Eritrean side of the Treaty line as determined by the Commission, the Commission finds that, on the basis of the evidence before it, Tserona and Fort Cadorna are not.

4.70 As to Tserona, the Commission cannot fail to give effect to Ethiopia's statement, made formally in a written pleading submitted to the Commission. It is an admission of which the Commission must take full account. It is necessary, therefore, to adjust the Treaty line so as to ensure that it is placed in Eritrean territory.

4.71 The qualification as to the southern section relates to the Acran region and to Fort Cadorna. The Commission is satisfied that the evidence of Eritrean activity is sufficient, in terms of administrative range, quantity, area and period, to justify

treating the Acran region as part of Eritrea. As regards Fort Cardorna, the Commission is bound to apply to that place, in the same way as it does to Tserona, the Ethiopian admission.

4.72 The Commission therefore decides that the boundary line which it has found to result from the 1900 Treaty must be adjusted in the manner set out in Chapter VIII, paragraph 8.1, sub-paragraph B.

2) The eastern part of the Belesa projection

4.73 This area lies to the east of the Belesa B and between the Ethiopian claim line passing to the north of Zalambessa and the Eritrean claim line passing along the Muna/Berbero Gado. It thus forms the central portion of the disputed territory along the Belesa-Muna line (the area shaded pink on Map 6, p. 36, above). Its principal town is Zalambessa, which did not exist in 1900.

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.74 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over a number of localities. These activities comprise such matters as the administration of polling stations and the holding of elections and the independence referendum, the appointment and payment of local officials, the conduct of a national census, the structure of local administration, the issue of trading and business licences, the establishment of a customs office at Zalambessa, land distribution and management, the payment of taxes and financial tribute, the administration of justice, law enforcement, the provision of educational facilities, the administration of fuel supplies, the grant of a mineral concession, patrolling by the British Military Administration, the establishment of police posts, the maintenance of a rainfall measuring position and the conduct of border surveys.

(b) *Diplomatic and other similar exchanges and records*

4.75 As far as concerns the diplomatic or official record, the Commission has been presented with little in the way of evidence relating specifically to this part of the Belesa projection, apart from certain exchanges relating to Zalambessa, which has been the location for a considerable number of significant administrative activities by Ethiopian authorities. On a number of occasions, Eritrean officials appear to have acknowledged that Zalambessa is part of Ethiopia. Zalambessa appears to be the seat of Gulomakheda Wereda, a part of Tigray province. Both Parties agree that there is a customs post some 2 km north of Zalambessa – in fact, probably two customs posts, one belonging to each Party, located close to each other. The location of such a post on one side of the town strongly suggests that the boundary is on the same side of the town, since to have a population centre *between* a boundary and a border customs post would be unusual. Ethiopia has, moreover, submitted evidence showing that the customs authorities of Eritrea regularly had dealings with the nearby Ethiopian customs post in such a

way as to accept Zalambessa as part of Ethiopia. An additional exchange in 1996 leads to the same conclusion. In that year, the Ethiopian Ministry of Foreign Affairs requested Eritrea to allow a survey team to enter Eritrean territory. The Eritrean Ministry of Foreign Affairs, in responding positively to this request, referred to it as being incidental to the task of "rechecking border delineating points in Zalambessa [sic] area (Tigray region)."

(c) *Maps*

4.76 The Commission has already addressed in general terms the significance of the map evidence for the western part of the Belesa projection. Similar comments are called for in relation to the eastern part. The ambiguity of the map evidence is the greater in this area, because the eastern part of the Belesa projection does not have the distinctive southward pocket which is so characteristic of the western part.

(d) *Conclusion regarding the eastern part of the Belesa projection*

4.77 The Commission has carefully weighed the evidence with which it has been presented by both Parties. Except to the extent corresponding to paragraphs 4.68-4.72, above, the Commission does not find that the evidence of the Parties' conduct establishes any departure from the boundary line as found by the Commission to result from the 1900 Treaty, save in respect of Zalambessa. There the evidence supports the conclusion that that town is Ethiopian.

4.78 The Commission has already decided that the boundary line resulting from the 1900 Treaty must be adjusted so as to ensure that Tserona, the Acran region and Fort Cadorna are placed in Eritrean territory (see paras. 4.70- 4.72, above). The manner of that adjustment is set out in Chapter VIII, paragraph 8.1, sub-paragraph B, below. The Commission now accordingly decides that the boundary resulting from the 1900 Treaty must be further adjusted, in the manner also set out in Chapter VIII, paragraph 8.1, sub-paragraph B, so as to place Zalambessa in Ethiopian territory.

3) <u>The Endeli projection (Irob)</u>

4.79 The Endeli projection consists of the roughly triangular piece of territory bounded on the south by the Muna/Berbero Gado, on the northeast by the upper reaches of the Endeli going upstream towards Senafe, and on the west by the north-south line of the Ethiopian claim line running down from near Senafe (this area is shaded blue on Map 6, p. 36, above). The principal population centre is Alitena. Although a substantial part of Irob lies to the north of the Muna/Berbero Gado, and thus within the Endeli projection, part of the region also lies to the south of that river and thus within Ethiopian territory. Geographical specificity is therefore particularly important in relation to incidents or activities occurring in the Irob area.

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.80 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over the localities in question. These activities comprise such matters as the regulation of religious and social institutions, civil administration, the management of local officials, the administration of elections and the independence referendum, the conduct of a national census, the structure of local administration, questions of land management and title, payment of taxes and payment of tribute, the administration of justice, law enforcement, administration of educational institutions, administration of public health, and the operation of public works projects.

(b) *Diplomatic and other similar exchanges and records*

4.81 The diplomatic and official record as put before the Commission includes an Italian military report of 1901, Martini's letters of June and July 1901 to Ciccodicola, Checchi's memorandum of 1915, Governor Zoli's report of July 1930, Italian Ministry of Colonies' report of 1930, Governor Astuto's report of May 1933, and Italian protests at cross-border incursions of 1933.

(c) *Maps*

4.82 The map evidence is uneven in relation to the Endeli projection. Very few maps depict an Endeli projection as appertaining to Ethiopia, and there is considerably more map support for a boundary along the Muna/Berbero Gado, at least along its lower reaches. At the same time there are a number of Italian maps spanning several decades after the conclusion of the 1900 Treaty which show no boundary along that part of the Muna/Berbero Gado, even though showing one elsewhere. There are also Italian maps showing, either expressly or implicitly, the upper reaches of the Endeli as the effective limit of Italian occupation.

4.83 The extent of Acchele Guzai and Agame has been of some importance in the context of the Endeli projection. The map evidence is unclear. Most maps do not give any indication of the two regions. Of those that do, some indicate only the one but not the other. Of those that do indicate one or both of the regions, by far the majority mark them in areas which do not impinge upon the Endeli projection, placing them respectively well to the north of Senafe or well to the south of the Muna/Berbero Gado. Relatively few mark the regions in such a way as to suggest which region includes all or part of the Endeli projection. It is in any event of the nature of cartographic indications of general geographic regions that they are unspecific, since the regions being indicated are usually themselves not limited by specific borders.

(d) *Conclusion regarding the Endeli projection*

4.84 The Commission has given careful consideration to the evidence submitted by the Parties. As in the other sectors, the evidence is not wholly consistent and does

not lead in one direction only. The Commission does, however, conclude that for the most part the stronger evidence of administrative and resultant activity has been presented by Ethiopia. The Commission has also attached weight to the facts that several Italian maps refrained from indicating a boundary along the southern limits of the Endeli projection, and have marked the upper reaches of the Endeli River as the actual limit of Italian occupation. Moreover, the Commission has noted that in several reports senior Italian officials, and also Italy's formal complaint to the League of Nations, acknowledged that significant parts of the area covered by the Endeli projection had always been Ethiopian and that Italy had never been present there.

4.85 Even so, the Commission is unable to draw from this the conclusion that it should vary the 1900 Treaty line so as to include the whole of the Endeli projection within Ethiopia. The Commission has noted that, in general, the impact of Ethiopian administrative activity has been weaker, and the impact of Eritrean activity stronger, in the northern and western fringes of the Endeli projection, and that therefore Ethiopia has not established its effective sovereignty to the required degree over those areas. The Treaty line should therefore be varied so as to place only the more southerly and easterly parts of the Endeli projection in Ethiopia.

4.86 The Commission therefore decides that the Treaty line must be accordingly adjusted in the manner set out in Chapter VIII, paragraph 8.1, sub-paragraph B, below.

4) The Bada region in the central sector

4.87 The Commission notes at the outset the need for caution in recording and responding to incidents said to have occurred "in Bada," since there is both a region of Bada, primarily consisting of the Bada plain, and a village in that region named Bada. Bada village appears to be located to the northeast of Rendacoma and possibly astride the Ragali. The Bada region is a broad area lying generally to the north of the Salt Lake and straddling the Endeli/Ragali rivers, so that it is partly on the Eritrean side of the boundary determined by the Commission to have been laid down in the 1900 Treaty (i.e., north and east of the Endeli/Ragali) and partly on the Ethiopian side (i.e., south and west of the Endeli/Ragali). Both Eritrea and Ethiopia appear to have local administrative sub-districts named "Bada." It is therefore particularly important to know precisely where particular events are said to have occurred before being able to attribute to them significance as regards the limits of territorial authority. Moreover, given that the Bada region is associated with the Endeli and Ragali, and that there may be settlements which, under a single name, spread over both sides of what may be regarded as boundary rivers, it will sometimes be particularly important to know precisely where within a settlement a particular incident or activity is said to have occurred.

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.88 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over the localities in question. These activities include such matters as the operation of telegraph and telephone communications facilities, the grant of a mineral concession and licences for associated communications facilities, the promotion of irrigation projects, the organisation of elections and the independence referendum, the holding of a national census, the administration of public health services, the administration of educational institutions, the establishment of military and police posts and the carrying out of military patrols, and the structure of local administration.

(b) *Diplomatic and other similar exchanges and records*

4.89 As far as concerns the diplomatic or official record, the Commission has been presented with little in the way of evidence relating specifically to the Bada area, apart from two incidents in 1901 and 1929 involving Tigrayan raids into the Bada area. The exchanges were, however, unspecific as to location and ambiguous as regards their import for questions of territorial sovereignty.

(c) *Maps*

4.90 The only point of disagreement between the Parties is where along the Endeli or Ragali the 1900 Treaty line ends and therefore the 1908 Treaty line begins. The map evidence overwhelmingly supports the Endeli/Ragali as the boundary. As to this, most maps are unspecific. Apart from the map attached to the report of the 1904 Boundary Commission (see Appendix A, below) which in any event is in this respect ambiguous, very few, if any, of the maps submitted in evidence clearly depict a boundary ending at Massolae. Of the rest, those which do depict an eastern terminus are almost equally divided between those which show it at or near Rendacoma and those which show it further to the east, at or near Ragali or, in a few instances, at the Salt Lake.

(d) *Conclusion regarding the Bada region in the central sector*

4.91 The Commission finds that the evidence is relatively sparse, often geographically unspecific, and of ambiguous significance for questions of territorial sovereignty. In particular, the evidence contains little support for terminating the 1900 Treaty boundary at some point (such as Massolae or Rendacoma) west of the Salt Lake. Accordingly, the Commission does not regard the evidence of the Parties' conduct in this area as a basis for departing from the boundary line as found by the Commission to result from the 1900 Treaty.

C. The Commission's Conclusions Regarding the 1900 Treaty Line as a Whole

4.92 The Commission's conclusions regarding the 1900 Treaty line as a whole will be found in Chapter VIII, paragraph 8.1, sub-paragraph B.

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CHAPTER V – THE SECTOR COVERED BY THE 1902 TREATY (WESTERN SECTOR)

A. THE TREATY TEXT

5.1 The Commission turns now to the sector covered by the 1902 Treaty, namely, the western sector. The second paragraph of Article I of the Treaty states that the frontier shall begin at the junction of the Khor Um Hagar with the Setit and extend to the junction of the Mareb and the Mai Ambessa.

5.2 The 1902 Treaty was described as being an Annex to the 1900 Treaty. Unlike the 1900 Treaty, which was a bilateral treaty between Ethiopia and Italy, the 1902 Treaty was a trilateral agreement to which Britain was also a party. This was because part of it (Article II) related to the frontier between Sudan (then under British administration) and Eritrea.

5.3 Article I of the English text provides as follows (the three paragraphs of the article were not individually numbered, but for convenience the Commission has inserted the numbers (i), (ii), (iii)):

> (i) The frontier Treaty between Ethiopia and Eritrea, previously determined by the line Tomat-Todluc, is mutually modified in the following manner: –
>
> (ii) Commencing from the junction of the Khor Um Hagar with the Setit, the new frontier follows this river to its junction with the Maieteb, following the latter's course so as to leave Mount Ala Tacura to Eritrea, and joins the Mareb at its junction with the Mai Ambessa.
>
> (iii) The line from the junction of the Setit and Maieteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, so that the Canama tribe belong to Eritrea.

An English translation of the Amharic text of paragraphs (ii) and (iii) reads as follows:

> The new frontier will start from Khor Um Hagar and Setit River junction and will follow the River Setit to the junction of the Mai Ten and Setit Rivers. From this junction, the frontier will leave Ala Takura in Eritrea and go to the junction of Mereb and Mai Anbessa. The boundary between the junction of the Mai Ten and Setit to the junction of Mereb and Mai Anbessa will be decided after representatives of the Italian government and the Ethiopian government look into the question and reach agreement. The representatives entrusted with this decision

> will decide in such a way that the Negroes of the Cunama tribe are in Eritrean territory.[29]

5.4 Article II of the Treaty provides:

> The frontier between Sudan and Eritrea, instead of that delimited by the English and Italian delegates by the Convention of 16th April, 1901 (No. 343), shall be the line which, from Sabderat, is traced via Abu Jamal to the junction of the Khor um Hagar with the Setit.

Article II has limited bearing on the issues presently before the Commission and only brief reference will be made to it in connection with the western terminus of the border (see paras. 5.6-5.12, below). In contrast with the 1900 Treaty, no map was attached to the 1902 Treaty or formed part of it.

5.5 The final paragraph of the 1902 Treaty states that it has been signed "in triplicate, written in the Italian, English and Amharic languages identically, all texts being official." In contrast with the final paragraph of the 1900 Treaty, the 1902 Treaty does not contain the proviso that "in case of error in writing the Emperor Menelik will rely on the Amharic version." However, the Commission does not need to consider whether this proviso carries over into the 1902 Treaty by reason of the latter being an "annex" to the 1900 Treaty because in the present case Ethiopia has not sought to invoke the Amharic version, although Eritrea has (see para. 5.15, below).

B. The Western Terminus

5.6 The Commission will begin its consideration of the 1902 Treaty by examining the location of the western terminus of the boundary as expressed in the opening words of Article I, paragraph (ii): "Commencing from the junction of the Khor Um Hagar with the Setit . . . ."

5.7 The Secretary of the Commission, in the performance of his function under Article 4, paragraph 9, of the December Agreement, found that there appeared to be no dispute between the Parties with regard to this portion of the border. Nor is the subject one to which the Parties gave any specific attention in the course of their pleadings, though Ethiopia stated that it reserved its position in relation thereto. However, a number of documents and large-scale maps represent or speak of the boundary as commencing not at Khor Um Hagar, but further to the west, at the confluence with the Setit of the Khor Royan, a river flowing into the Setit from the ESE (Point 1). The Commission therefore finds it necessary to consider the location of the western terminus.[30]

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[29] Translation provided in the Eritrean pleadings.

[30] The relevant treaty texts are collected in Professor I. Brownlie's *African Boundaries* (1979) (hereinafter referred to as "*African Boundaries*").

5.8 Article II of the 1902 Agreement amends the frontier between Sudan and Eritrea as delimited initially by a treaty of 16 April 1901.[31] Another agreement between Sudan and Eritrea of the same date describes the demarcation of this boundary.[32] A further agreement of 22 November 1901 provides for the completion of the delimitation between Sudan and Eritrea "as far as the junction of the Khor Um Hagar with the River Setit" – "the line to be eventually demarcated by special Delegates."[33] The Khor Um Hagar is mentioned again as a location on the frontier between Sudan and Ethiopia in Article I of the Treaty of 15 May 1902, which is an agreement distinct from the 1902 Treaty involved in the present proceedings.[34]

5.9 The 1902 Treaty, it will be recalled, was described as an Annex not only to the 1900 Treaty but also to the separate Treaty of 15 May 1902 regarding the frontier between Sudan and Ethiopia, the agreement mentioned in the preceding paragraph. To implement the changes made in the latter agreement, a further Sudan-Eritrea agreement was made on 18 February 1903[35] which ran the line of "the rectified boundary" along a new course from the Jebel Abu Gamal "to the bend of the Setit immediately opposite the mouth of the Khor Royan." This was later referred to as "the Talbot/Martinelli demarcation."

5.10 This agreement was confirmed by a further Sudan-Eritrea agreement of 1 February 1916, of which the first article read:

> The boundary starts from a point on the right bank of the Setit River, immediately opposite the mouth of the Khor Royan.[36]

5.11 Ethiopia accepted this amendment by an Exchange of Notes of 18 July 1972 in the following words:

> Basic acceptance of Major Gwynne's demarcation on the basis of the 1902 and 1907 treaties . . . . As regards the boundary north of the Setit River, acceptance of the Talbot/Martinelli demarcation of February 1903 (as intensified in February 1916) as the boundary line as far as Abu Gamal.[37]

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[31] *African Boundaries*, p. 864.

[32] *Id.*

[33] *Ibid.*, p. 865.

[34] *Ibid.*, p. 866.

[35] *Ibid.*, p. 868.

[36] *Ibid.*, p. 871.

[37] *Ibid.*, p. 877.

Thus, it was the February 1903 demarcation that brought the tripoint to the north bank of the Setit opposite the Khor Royan.

5.12 It is not open to the Commission to change the agreed tripoint between Eritrea, Ethiopia and the Sudan. As the Ethiopian-Eritrean boundary is in this sector a river boundary,[38] it must be treated as starting at the tripoint, then running to the centre of the Setit, immediately opposite that point, before turning eastwards and continuing up the Setit until it turns to the northeast to run towards the confluence of Mareb and Mai Ambessa (Point 9).

C. THE SECTOR SETIT-MAREB

5.13 The Commission turns now to consider the most contentious part of the boundary covered by the 1902 Treaty, namely, the point in the Setit where the boundary turns away from this river to follow another named river towards the confluence of the Mareb and the Mai Ambessa (Point 9). This other river is named the "Maieteb" in the English version of the Treaty and "Maiten" in the Amharic version. The central question in this part of the case is, therefore, to what river the Treaty here refers. Closely associated with this is the question of the course of the link between that river and the Mareb.

5.14 Ethiopia contends that, as used in the Treaty, "Maieteb" refers to the river of that name that reaches the Setit from the northwest at Point 3, from the source of which a straight line is drawn to Point 9 (hereinafter referred to as the "western Maiteb"). As drawn on the maps invoked by Ethiopia, this line runs to Point 9 at an angle varying between 65° and 73° east of true north.

5.15 Eritrea initially maintained that the river designated in the equally authoritative Amharic version of the Treaty is named the Maiten. A river of similar name, the Mai Tenné, joins the Setit at Point 8, some 87 km further east than the western Maiteb. From this confluence, Eritrea contended that a straight line runs northeast to Point 9. Such a line would be at an angle that, depending on the map used, varies between 13° and 16°. Eritrea later submitted that the boundary line subsequently established and maintained by the Parties was a straight line running from the confluence of the Setit and the Tomsa (Point 6) to the Mai Ambessa (Point 9). Such a line runs at an angle varying between 22° and 25° from true north. In its final submissions, however, Eritrea gave as the southern terminus of the straight line connecting to Point 9 what turn out to be two different locations. One, defined by coordinates (14° 05' 45.6" N, 37° 34' 26.4" E), terminates at Point 7A. The other is defined in terms of a claim line drawn on a map which, however, terminates at a different location, namely, Point 7B (14° 06' N, 37° 35' E). Neither of these is at the Tomsa (Point 6). Eritrea also suggested that the original Treaty reference to the "Maiteb" was actually to the Sittona (Point 4).

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[38] See Chapter VII, below, for consideration of the boundary within rivers.

CHAPTER V – 1902 TREATY (WESTERN SECTOR)

1) Interpretation of the Treaty

5.16 The resolution of this issue depends initially upon a proper interpretation of the Treaty. That interpretation in turn depends upon the text of Article I, read in the light of its object and purpose, its context and negotiating history, and the subsequent course of conduct of the Parties in its application – all of which are tools for determining "the common will" of the parties.

(a) *The terms of the Treaty*

5.17 The determination of the meaning and effect of a geographical name used in a treaty, whether of a place or of a river, depends upon the contemporary understanding of the location to which that name related at the time of the treaty. If the location can be identified without difference of opinion, interpretation is relatively simple. But when the maps available at the time vary in their placement of the feature, difficulties emerge. That is to some extent the problem in the present case.

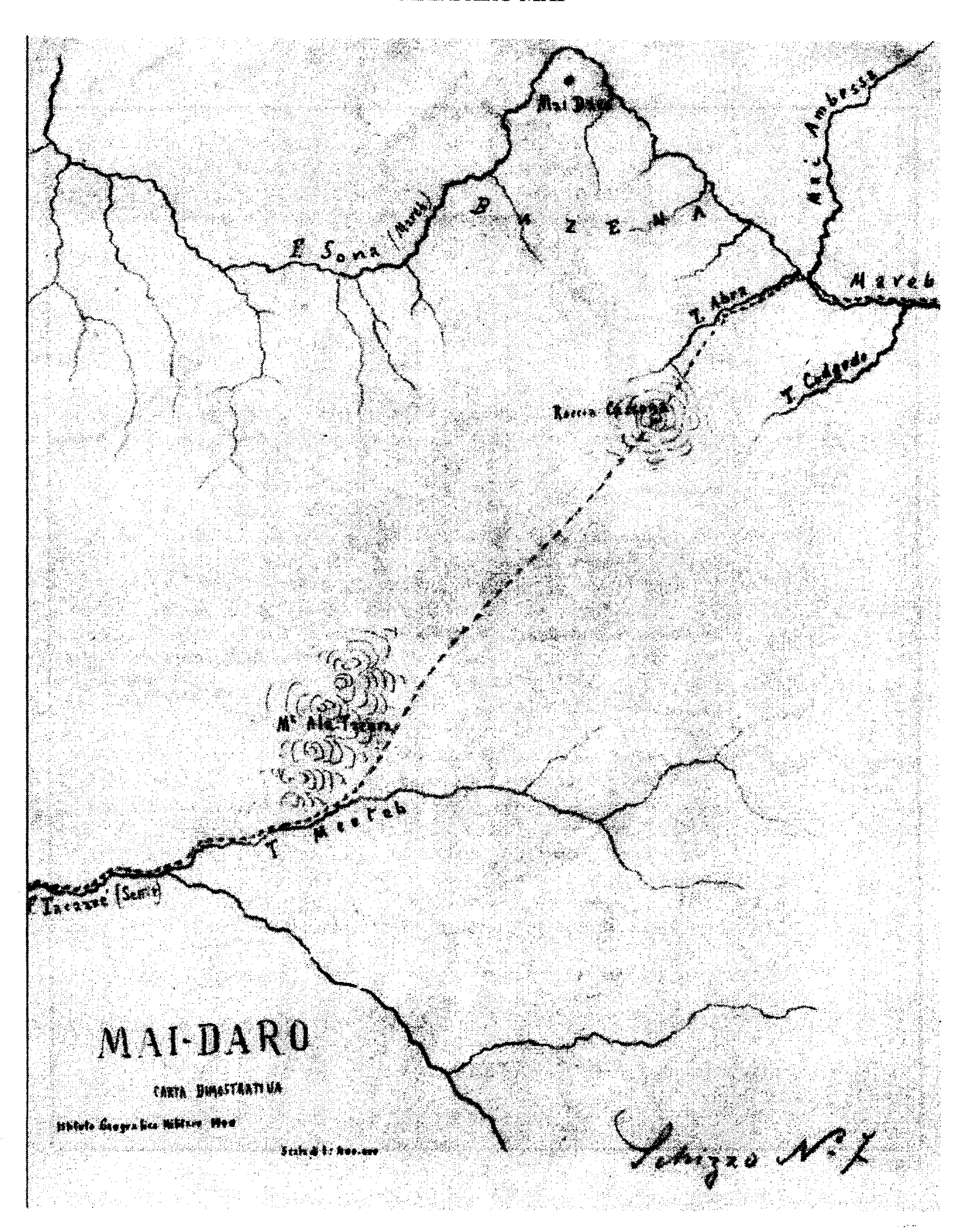
5.18 The Commission accepts that at first sight the reference to the Maiteb in Article I(ii) of the Treaty appears to be to the river of that name, as argued by Ethiopia, that joins the Setit at Point 3. One contemporary map in particular, the Sketch Map illustrating Article I of the Treaty between Great Britain and Ethiopia relating to the Sudan border signed on the same day as the 1902 Treaty involved in the present case, shows clearly in its top right corner the northern terminus of that boundary ending at the Setit and then indicates a short eastward-extending stretch of the Setit, which, in its turn, ends at a tributary that the Sketch Map calls the "Maieteb." The same is shown on a map of the Anglo-Egyptian Sudan of 1901 and even more clearly on the so-called Talbot-Colli map of the same year. These maps extend no further east than the Maiteb as there presented. Nor is there any evidence that the Parties were in possession on 15 May 1902 of any map showing a river Maiten (or Mai-Tenne) (Point 8) even further east. The first map on which a river of that name is shown is the 1904 Italian Carta Dimostrativa, on a scale of 1:500,000. On the basis of these maps, therefore, it is arguable that the river identified by Ethiopia as the Maiteb (the confluence of which with the Setit is shown at Point 3) is the Maiteb to which the Treaty refers.

5.19 As against this, however, there is more convincing evidence that the Maiteb is not the river which the Parties had in mind. The maps just referred to were not the only ones likely to have been familiar to the negotiators who were, on the Ethiopian side, the Emperor Menelik and, on the Italian side, Major Ciccodicola. Nor were these maps used in the negotiations.

5.20 The Emperor Menelik appears to have left no record of the negotiations. On the Italian side, however, there are two reports of Major Ciccodicola, dated 16 May 1902 and 28 June 1902, one immediately after the signature of the Treaty, the other barely five weeks later, which indicate clearly the map that was actually used in the discussions.

Map 8

MAI DARO MAP



5.21 In his first report, dated 16 May 1902, Ciccodicola, cabling from Addis Ababa, informed the Governor of Eritrea, Martini, that the 1902 Agreement had been signed the previous night:

> . . . the Cunama remains with us as soon as the ratification takes place. The border line will be delimited on the ground by delegates; it is now fixed by two well defined points, *see Mai Daro demonstrative map 1900 Military Geographical Institute scale 1 to 400,000 that is the course of the Maiteb east of Montala Tacura and Mai Ambessa with the Mareb.*[39]

The Mai Daro demonstrative map here referred to appears to be the map that was attached to Ciccodicola's second report as "Sketch No. 7," which is examined below. A copy of this map appears as Map 8, on page 62. It will be referred to as the "Mai Daro map."

5.22 In his second report, of 28 June 1902, Ciccodicola said:

> . . . [W]hen negotiating, I have always used the maps sent by the Government. But since the afore-mentioned Maidaro paper is not a sure basis, I had to accept at least in part Menelik's objections, based on the information of the places obtained by him, and make him accept, albeit not without pain and hard work, as the general direction of principle of the boundary between the Cunama and the Adiabo, *the line which appears in the afore-mentioned Maidoro [sic] sheet*[40] *etermined by the mouth of the Maiteb in the Setit, turning east of the Ala Tacura mountains, and then going to the Mareb, at the Mai-Ambessa junction.*
>
> In future, our delegates and Ethiopian delegates will determine the boundary exactly, by surveying with an investigation on the ground. It remains therefore established that the Cunama villages become part of the Colony of Eritrea, as of the day of the sovereign ratification of the convention.[41]

5.23 The fact that the Mai Daro map spelled the river as "Meeteb" does not appear to the Commission to affect the situation, for Ciccodicola appears to have equated "Maiteb" with "Meeteb." The intention of the negotiators revealed by the two letters is sufficiently clear.

5.24 The Commission attaches importance to the Mai Daro map because it clearly shows that, contrary to inferences that might otherwise be drawn from the existence of other maps of the area showing the location of the Maiteb as being that of the western Maiteb at Point 3, such maps were not used in the nego-

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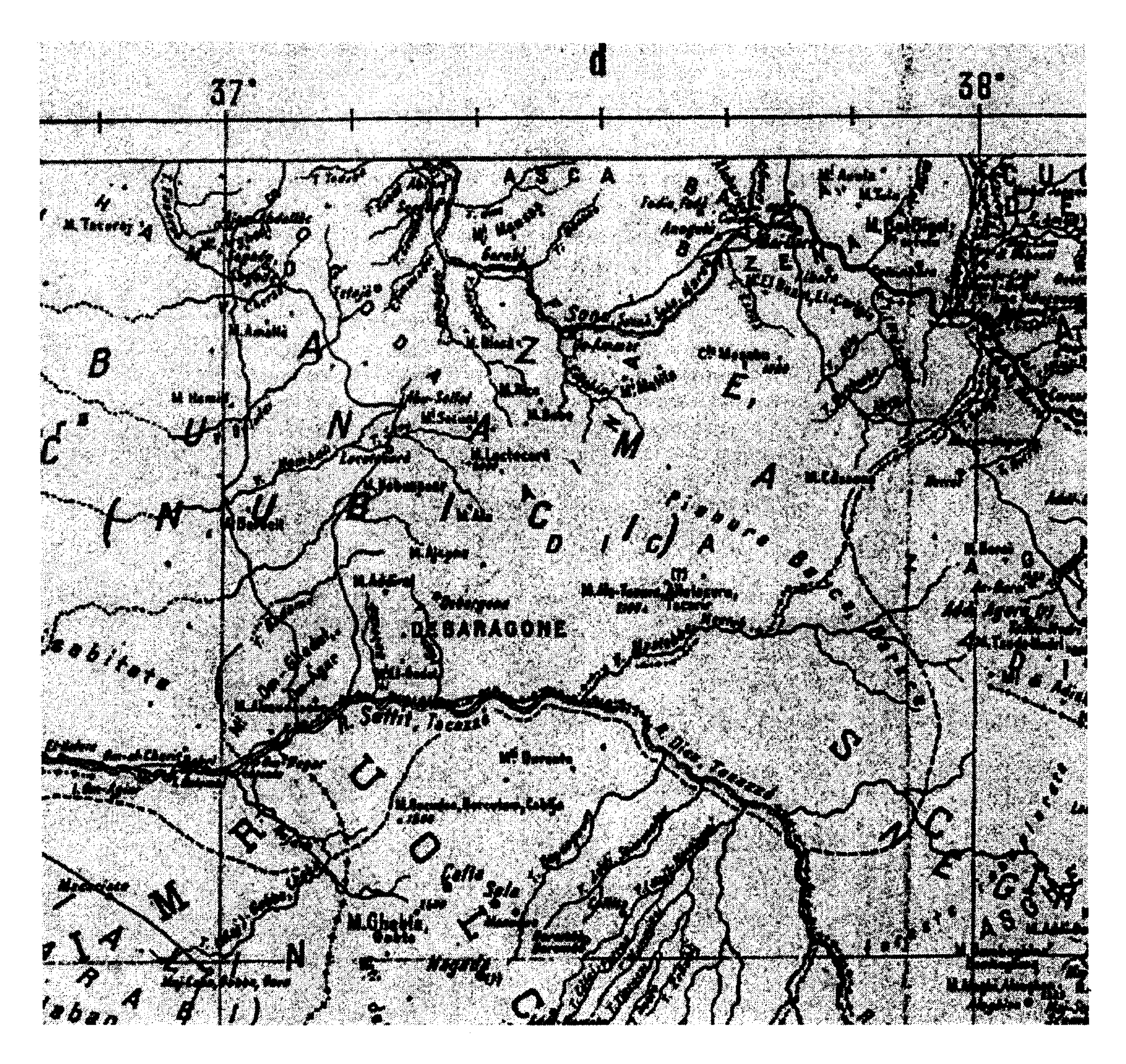
[39] Commission's emphasis.

[40] See Map 8.

[41] Commission's emphasis.

Map 9

DE CHAURAND MAP
Excerpt Corresponding to the Mai Daro Map



tiations between Menelik and Ciccodicola. Nor, seemingly, was their detail relating to the location of the western Maiteb taken into account by Menelik or Ciccodicola. As Ciccodicola's report makes plain, the only map that he and Menelik had before them was the Mai Daro map.

5.25 There are no less than four reasons why the river named "Meeteb" and the mountain called "Ala Tacura" shown on this map could not actually have been situated in the proximity of the western Maiteb. The first is that the location of Mai Daro at the top of the map and of the confluence of the Mareb and Mai Ambessa (Point 9) are in reality well to the east of the confluence of the western Maiteb with the Setit (Point 3) – as can be demonstrated by dropping a meridional line from Mai Daro southwards to the Setit. Second, the river marked "Meeteb" on the map joins the Setit at a point that lies on the eastern part of the prominent north-trending bend in that river, whereas the confluence of the western Maiteb and the Setit (Point 3) lies well to the west of that curve. Third, the direction and length of the course attributed to the Meeteb on the map differs markedly from the course and length of the western Maiteb. Fourth, a straight line drawn from any point on the western Maiteb that joins the Setit at Point 3 could only reach Point 9 at the angle of 60°-65°, while the line on Map 8 reaches Point 9 at the markedly different angle of 45°.

5.26 The significance and evidentiary weight of the Mai Daro map is confirmed by its similarity with the de Chaurand map of 1894. An excerpt from this map appears as Map 9, on page 64. This, it will be recalled, is the map that was expressly stated to have been the basis for the 1900 Treaty map and it must have been familiar to the negotiators. It does not show any Maiteb or Meeteb remotely near the confluence of the western Maiteb and the Setit (Point 3). It does, however, show quite clearly a "Maitebbe-Meeteb" joining the Setit at Point 4 on the east side of the prominent north-pointing bend, running first northeast and then east. It also shows a "Mount Ala Tacura," just north of the river. In these major respects, it is almost identical with the Mai Daro map. The only respect in which both the Mai Daro map and the de Chaurand map differ significantly from later maps is in the name given to the river. What is called in them "Maietebe" or "Meeteb" was known even at the time by some as Sittona and was so called on other maps soon afterwards.

5.27 The identification of the Maiteb referred to in the 1902 Treaty as the Meeteb of the Mai Daro map or the Maietebbe-Meeteb of the de Chaurand map does not, however, by itself resolve the question. It is necessary to have regard also to a further important element in the interpretation of treaties, namely, the object and purpose of the Treaty.

(b) *The object and purpose of the Treaty*

5.28 The object and purpose of the 1902 Treaty can be considered at two levels: the general and the particular. At the general level, it is obvious that the Treaty was intended to determine a boundary. Such an identification of purpose, however,

does not advance matters, since it does not help in the choice between one possible boundary and another.

5.29 More important is the identification of the particular object of the Treaty. Here it is necessary to distinguish between two separate matters dealt with in Article I of the Treaty. The first, in paragraph (i), is the reference to Mount Ala Tacura. The frontier is to follow the course of the Maiteb so as to leave that mountain to Eritrea. The second is the provision in paragraph (ii) that the line from the junction of the Setit and the Maiteb to the junction of the Mareb and Mai Ambessa "shall be delimited by Italian and Ethiopian delegates, so that the Cunama tribe belong to Eritrea."

(i) The reference to Mount Ala Tacura

5.30 Of these two aspects, the first is of little importance. It says no more than that the boundary following the principal named geographical feature, the Maiteb, will have the effect that it passes to the east of the named mountain, thereby leaving it to Eritrea. That is not a statement of an object of the Treaty.

(ii) The incorporation of the Cunama into Eritrea

5.31 The second aspect, the requirement in paragraph (ii) that the line should be so delimited "that the Cunama tribe belong to Eritrea," is of a different order of significance. It reflects the growing Italian interest in the Cunama in the preceding years. This interest is evidenced by a report of the instructions given by the Italian Foreign Ministry to Consul General Nerazzini on 22 March 1897

> . . . in order to *add the tribe of the Cunama to the Eritrean Colony*, to keep the trade roads to Gonda and the vast fertile basin of the Tzana free and under our complete control, thus anticipating and satisfying the desires and fair requests of the Commissioner for Eritrea.[42]

The idea of following tribal boundaries was one which, it appears, was subsequently acknowledged by Menelik in his negotiations with Britain in May 1899 for the settlement of the boundary between Sudan and Ethiopia and was repeated on the British side.

5.32 This particular objective was pursued further in a Confidential Arrangement between Britain and Italy of 22 November 1901, which provided in paragraph 5 that:

> The British and Italian Agents in Abyssinia will work together in concert to obtain from Emperor Menelik in return for this extension of

[42] This report was referred to in the report of 28 June 1902 from Major Ciccodicola, the Italian negotiator of the 1902 Treaty, to the Italian Ministry of Foreign Affairs, cited in para. 5.22, above.

> the Abyssinian boundary, a zone of territory to the east of the Todluc-Maiteb line, *which will give to Erythrea the whole of the Kunama tribe up to the Mareb.*[43]

This Declaration did not, of course, bind Ethiopia, but it does demonstrate the existence of the Italian interest in obtaining the territory occupied by the Cunama tribe, as well as the British recognition of that interest.

5.33 Further significant evidence of the importance attached by Italy at that time to the acquisition of the Cunama land is provided by the terms in which Ciccodicola and Martini, the Governor of Eritrea, both commented upon the Treaty soon after its conclusion (see paras. 5.39-5.41, 5.46, below).

5.34 Lastly, the terms of the 1902 Treaty itself attest to the objective of achieving the transfer to Eritrea of the Cunama. Thus, paragraph (iii) of Article I of the 1902 Treaty provided:

> The line from the junction of the Setit and Maieteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, *so that the Canama [sic] tribe belong to Eritrea.*[44]

These words indicate that the line described in the Treaty was not completely defined; that a portion of it was still to be delimited by delegates of the two Parties; and that the object of that delimitation was precisely to ensure that the Cunama tribe belonged to Eritrea. This must be a reference to at least the bulk of the Cunama tribal area, if not the whole of it. There appears to be no basis for any suggestion that the intention was to confine it to a significantly truncated part of the Cunama tribe or its tribal area. Thus, the text contemplates that the delegates of the Parties were to perform a two-stage function: first, they would have to ascertain facts, namely, the region regarded as the domain of the Cunama; second, they would have to reflect those facts by the construction of an appropriate line that placed that region in Eritrea not Ethiopia. In fact, no such delimitation by delegates of both Parties ever specifically took place.

5.35 There was an additional objective that Italy had in mind at this time (as indicated in the instructions to Nerazzini quoted in para. 5.31, above), though not expressly referred to in the Treaty, namely, to ensure its control over an important trade route through which much commerce of Eritrea passed to and from Ethiopia, namely, the road or track that connected Ducambia, on the southern bank of the Mareb, with Sittona, on the northern bank of the Setit and which continued southwards to Gondar in Ethiopia. This ran on an approximately north-south curved axis at 37° 24' E longitude. This route was subsequently shown on a map entitled "Strade Commerciali Setit Noggara e Setit – Gondar," circa 1904-1906.

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[43] Commission's emphasis.

[44] Commission's emphasis.

5.36 While the first objective – the assignment of Cunama land to Italy – was an explicit common objective of the Parties, the second objective just mentioned may be regarded as essentially Italian. There is no specific evidence as to Ethiopia's objective with respect to the trade route; nor is there any evidence suggesting Ethiopian opposition to Italy's objectives in this regard.

(c) *The relation between the negotiations of May 1902 and the principal objective of the Treaty*

5.37 The objective of attaching the Cunama to Eritrea having thus been identified, it is now necessary to examine more closely how this was reflected in the manner in which Article I of the Treaty was concluded. As stated, it was negotiated, on the Ethiopian side, by the Emperor Menelik himself and, on the Italian side, by Major Ciccodicola.

5.38 The Emperor Menelik appears not to have left any record of the negotiations. On the Italian side, however, reference has already been made to the two reports of Major Ciccodicola of 16 May 1902 and 28 June 1902. Moreover, there is another document, written in August 1902, that throws light on the intention and understanding of Martini, then Governor of Eritrea (see para. 5.46, below).

5.39 In his first report Ciccodicola stated:

> . . . the Cunama remains with us as soon as the ratification takes place. The border line will be delimited on the ground by delegates . . . .

5.40 In the first part of his second report, of 28 June 1902, entitled significantly "Agreement for the Cunama," Ciccodicola noted that:

> In future, our delegates and Ethiopian delegates will determine the boundary exactly, by surveying with an investigation on the ground. It remains therefore established that the Cunama villages become part of the Colony of Eritrea, as of the day of the sovereign ratification of the convention.

5.41 This last observation reflected the uncertainty that both negotiators evidently felt about the exact course that the line from the Setit to the Mareb should follow and which they had deliberately left open by using the words:

> [t]he line from the junction of the Setit and Maiteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, so that the Canama tribe belong to Eritrea.[45]

5.42 Thus the legal position at this juncture appears to the Commission to be as follows. Although the Parties used the name "Maiteb" in the Treaty, it is clear

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[45] See Appendix B, below, for details regarding the extent of contemporary knowledge of the location of the Cunama.

that they did not thereby intend to refer to the western Maiteb, since it lies considerably west of the Meeteb (Sittona) which the negotiators evidently contemplated (on the basis of the Mai Daro map) as the southern end of the eastern boundary of Cunama territory, and of the link between the Setit and the Mareb delimiting that territory. The details of the line between the Sittona, the river they actually had in mind, and the Mareb were, however, left for later delimitation. No formal delimitation was ever carried out.

5.43 Although a great deal of evidence was placed before it, mostly from the Italian archives of the period 1902-1932, discussing the location of the Maiteb and the possibility that the intended river was the Maiten, the Commission does not find it necessary, in light of its findings, to enter into any discussion of this material. Nor has the Commission been able to identify any evidence of events in the years following 1902 to suggest that the Parties' actual intention to select the Meeteb of the Mai Daro map was changed to the western Maiteb.

2) <u>Developments subsequent to the Treaty</u>

5.44 In order to complete its task of interpreting the Treaty in the light of applicable international law, the Commission now turns to an examination of the principal items evidencing subsequent conduct or practice of the Parties that the Commission considers relevant for this purpose.

5.45 In the nature of things, the catalogue that follows cannot be comprehensive. The Commission omits many minor points of detail which appear to it not to affect the main course of developments. The consideration of the material will be more detailed in the first thirty or so years following the Treaty. This is because by the early 1930s the situation had largely crystallized. Events subsequent to 1930, though much discussed by the Parties, merely confirmed the present situation in a variety of ways. That material will, therefore, be presented more briefly.

Martini letter, 3 August 1902

5.46 A letter that Martini wrote to Ciccodicola, though reflecting some misunderstanding about the river names,[46] is clear in its emphasis on the intention of the Treaty to transfer the Cunama to Eritrea:

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[46] The misunderstanding about river names appears to stem from Martini's seeming belief that the Maiteb referred to in the 1902 Treaty was the western (Ethiopian) Maiteb. He rightly saw a boundary based on that river as breaking the Cunama in two. He also seems to have thought that the Meeteb on the Mai Daro map was the western Maiteb. In other words, while he appreciated that there were two distinct rivers at Points 3 and 4, which he called the Maiteb and the Sittona respectively, he appears not to have understood that the river at Point 4 (that he called Sittona) was in fact the Maieteb/Meeteb of the de Chaurand map and that it was that name that the Mai Daro map had given to the Sittona.

I have received the note of 21 June No. 80 by H.E. and the enclosed copy of the report that you sent to H.E. the Minister of Foreign Affairs on the recent Convention between Italy, England and Abyssinia.

The purpose of the secret treaty, concluded in Rome on 22 November of last year between England and Italy, *was, among other things, the transfer of all Cunamas established between the Gash and the Setit, to our dependency*. This is also affirmed in the second paragraph of Article I of the Convention of 15 May 1902 with Menelik.

However, you rightly complain of the lack of reliable date for that area. The map at 1/400,000 is not regarding the course of the Setit, at all precise. The fact that that map had to be used in the negotiations with the Negus had an unfavourable influence on the geographic determination of the boundary as indicated in the first part of the mentioned Article I. This in fact establishes that our boundary follow the Setit from its junction with the Mai Teb, then go up the latter and from there go toward the Mareb, ending the front of the source of the Mai Ambessa [*sic*].

Now, as I could ascertain myself during my recognition of the Setit, *this boundary would break in two those Cunama which, it has been established, should entirely pass to us.*

In fact, the Cunama towards the east go up to the river Sittona.

It is also true that on the maps at 1/400,000 the course of the Maiteb appears to be confused with that of the Sittona. In fact, the Sittona enters the Setit at the top of the big arc that the Setit does in coming out of Uolcait and Adiabo to enter the Cunama region. Now, on the 1/400,000 map precisely in that point is marked the source of the Mai Teb.

I must also warn that according to the surveys made during my recognition of the area, while the source of the Sittona is distant in a straight line about one hundred and ten kilometers from Ombrega, that of the Maiteb is only forty [kilometres] distant.

The misunderstanding can certainly not be attributed to anyone; so far those regions were too scarcely known and reliable maps did not exist. Only now, with the surveys which I had made and with others carried out some time later it is possible to draw a rather faithful sketch. This sketch is already been made as soon as completed I will transmit a copy to you.

In any event, it must be kept in mind that *the boundary described in Article I of the Convention of 15 May 1902 is in open contradiction with the attribution of the Cunama to Italy which is the basis of that Convention and which is explicitly wanted,* as essential condition for the modifications of the boundary with England, also by the secret agreement of 22 November of last year. The designation of the

boundary in the May Convention cannot, in my opinion, be considered if not as subordinated to the condition that that boundary be such as to be in harmony with the main stipulation, which is the transfer of the Cunama to Italy, *I have to insist particularly on our right to have all the Cunama up to the Sittona.*[47]

Garasellassie letter, 8 August 1902

5.47 It is significant that Ethiopia evinced no inclination to question the manner prescribed for dealing with the Cunama lands. On 8 August 1902, Garasellassie, the Ethiopian Governor of Tigray, acknowledged a letter from Martini dated 3 August (not produced by either Party in these proceedings) in which Martini had reported on the borders agreed with Menelik, possibly along the lines of his letter to Ciccodicola of the same date. Garasellassie stated that "Cunama is a name that we generally apply to all of the Baria villages" and said that he would therefore "appreciate a clear explanation on which are the villages you mentioned from Mai Ambessa and [going to] the Setit. Please let me know the names of nearby villages so that I can use it as a rule." The record contains no reply to this letter. It seems quite unlikely that Garasellassie would have written in these terms had he not clearly understood that the Cunama were to be placed in Eritrea.

Prinetti map, 10 December 1902

5.48 One of the earliest maps illustrating the boundary established by the 1902 Treaty is the Carta Dimostrativa presented to the Italian Parliament by the Ministry of Foreign Affairs on 10 December 1902. Drawn on a scale of 1:2,000,000, it is sometimes called the "Prinetti" map. It shows the boundary as following the Setit from the west. The western Maiteb is not shown where it might be expected, namely, to the west of the northward-trending curve of the river at about 36° 55'. Instead, the map shows a river called "Maiteb" to the southeast of that curve, at about the point where the Sittona meets the Setit (Point 4). The line then follows that river some distance before turning northeast to run straight to the Mareb/Mai Ambessa junction (Point 9) at an angle of about 50° from true north. The map thus does not support the Ethiopian claim line. Equally, it does not support the Eritrean line insofar as the latter claims to run northeastwards from the Tomsa (Point 6). In its placement of the Maiteb *vis à vis* Mai Daro to the north and its confluence with the Setit, the map resembles the "Mai Daro" map used by Ciccodicola and Menelik in the negotiations and is subject to the same comments.[48] As will be seen, the line on this map was not reproduced in later maps. It shows the Cunama as stretching across all the territory between the Setit and the Mareb from the border with the Sudan as far as the Treaty line. If, however, the confluence of the Setit and the Maiteb had been placed at its

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[47] Commission's emphasis.

[48] See, e.g., Zoli in 1929, para. 5.68, below.

western location (Point 3), the line to Point 9 would have cut the Cunama territory in half.

1903

5.49 The second Italian map showing the boundary, or at any rate, the southern part of it, is the "Ombrega" sheet of the Carta Dimostrativa produced by the Istituto Geografico Militare in 1903. This shows the mouth of the western Maiteb at Point 3 and carries a marking indicative of the boundary line turning northeastwards at that point, but not following the Maiteb, at an angle of approximately 60° from true north. The line is not shown the whole way to Point 9, as it soon reaches the eastern margin of the map. But, at the point where it stops, it says "a Mareb Mai Ambessa." A detailed map of the Cunama region on a scale of 1:400,000 prepared by Bordoni, dated 18 March 1903 and produced by the Istituto Geografico Militare in that year, evidently for internal use, shows the western Maiteb, and the beginnings of the boundary, also running northeastwards.

Gubernatorial Decree, 1903

5.50 On 25 March 1903, the Governor of Eritrea, Martini, enacted Gubernatorial Decree No. 178, which established a *Residenza* to exercise jurisdiction in the Gash (Mareb) and Setit area over the Baria and Cunama tribes. On 9 May 1903, the Governor published a further decree (No. 202) delimiting the territory of the new Residency. The relevant paragraph provided:

> It [the border] first follows the Setit and then goes to the confluence of the Mai Ambessa with the Mareb.

Martini subsequently explained this step in a memorandum entitled "Administrative Districts" (undated, but possibly 1907; see para. 5.62, below).

Pollera report, 17 May 1904

5.51 On 17 May 1904, the Resident of the Government Seat of Gasc, Pollera, reported on the eastern border of the Cunama region and the territory between the Gasc and the Setit, between meridians 37° 30' and 37° 55'. The report merits extensive quotation and the pertinent parts are reproduced in Appendix B, below, para. B9.

5.52 The names and places mentioned in the Pollera report all appear in the accompanying "Demonstrative Sketch of the Region of Afra" on a scale of 1:400,000. This map is not dated but is stated in the list of maps in the Eritrean Atlas as being "1904." It carries two lines of particular interest. One relates to "the territorial limits according to the Cunama tradition." This leaves the Setit at a point near a mountain called "Ab Omi," slightly southeast of the confluence of the Mai Tenné (Point 8). It then runs northeastwards until it meets the Mai Tenné, whereupon it turns northwest, crossing the Tomsa, until it reaches "M.

Tabi" where it turns to the northeast again and runs to "Collina Gugula." There it turns NNE until it reaches the Mareb at the confluence of the Gongoma, some distance upstream (i.e., southeast) of Point 9.

5.53 The other line of interest on this map is labelled "Confine che si propose" and seems to be the line which Pollera thought it would be appropriate to advocate in the negotiations that had yet to take place for the boundary in this sector. This line starts further upstream the Setit at the confluence of the Tomsa (Point 6), runs up that river in a northeasterly direction, follows a tributary of that river, the Gual Sohei, until it reaches the line marking the traditional limits of the Cunama possession at Collina Gugula. There, but without specific marking, it presumably joins the latter line. The general inclination of this line from Point 6 to Point 9 is 33° from true north.

5.54 This sketch is also one of the rare maps that mark a village called "Aifori," just south of the Setit, approximately halfway between the confluences of the Sittona and the Tomsa with the Setit. Aifori is of interest because it was referred to in an Italian file note (with no stated author) dated January 1904, called "Pro Memoria." This recorded that Ciccodicola had mentioned the opportunity of delimiting the border east of the Ducambia-Sittona road. Ciccodicola was also reported as stating that the village of Aifori south of the Setit would remain in Ethiopia, but the upper part (presumably the part north of the Setit) would remain with Italy. Also, the *baraca* (the plain) was to be divided in half between Eritrea and Ethiopia. Thus, if the Ethiopian contention is correct, the "upper part" of Aifori would, contrary to Menelik's own request, have been part of Ethiopia.

Comando del Corpe di Stato Maggiore map, 1904

5.55 In 1904 there appeared the Comando del Corpe di Stato Maggiore map, on a scale of 1:500,000, of the whole of Eritrea. This, the first large scale map of the whole country, shows very clearly the boundary following the Setit from the west, passing a river called the "Mai Teb" at approximately 36° 52', then passing the mouth of the Sittona at approximately 37° 25', until at a river called "Tomsa" at approximately 37° 38' (Point 6) it turns sharply to the northeast at an angle of 23° to run in an unbroken straight line until it meets the Mareb at Point 9.

5.56 The line thus marked, with its two termini and general direction, is the line that has since then (with the exception of the 1905 Italian map about to be referred to and the Ethiopian map of 1923; see para. 5.65, below) constantly been adhered to on the maps produced by both Eritrea and Ethiopia. Having regard to the circumstances in which it was drawn, as described in a 1907 memorandum by Martini (see para. 5.62, below), the Commission is unable to accept the characterisation of the line as reflecting Italian cartographic expansionism or as having been drawn in any way other than in good faith. There is no evidence before the Commission to support such a characterisation which has merely taken the form of unsupported assertion.

Checchi map, 1904

5.57 In addition, there is an Italian map of the "Subdivisioni Territoriali d'Oltre Mareb," completed by Checchi on a scale of 1:750,000, drawing the boundary northeastwards from the mouth of the Tomsa at an angle of 24° from true north.

Miani map, 1905

5.58 In contrast with the 1904 map just mentioned, there appeared in 1905 another Istituto Geografico Militare map over the name of Captain Miani, also on a scale of 1:500,000, which in its geographical detail is very similar to the 1904 map. The principal relevant difference, however, is that it carries the boundary along the Ethiopian claim line direct from the mouth of the western Maiteb (Point 3), though not following that river, in a straight line to the Mareb/Mai Ambessa confluence (Point 9). In so doing, it cuts across the name "Cunama," thus leaving part of that territory to Ethiopia.

5.59 In the same year, there appeared a further map from the Comando del Corpo di Stato Maggiore, on a scale of 1:800,000, showing much the same information as the Miani map of the same year. Again, the name "Cunama" is cut by the Ethiopian claim line, which runs at an angle of 63° from true north.

Martini reports, 1906

5.60 On 10 January 1906, the Governor of Eritrea, Martini, reported to the Italian Ministry of Foreign Affairs that

> the border towards Adiabo is still to be defined on the ground following Article 1 of the 19 [*sic*] May 1902. Following the intention of the last sentences of the mentioned article and following the present de facto possession, the border can be marked with the line that goes from the confluence Mareb-Mai Ambessa and meets the Setit at the confluence with the torrent Tomsa, which is about thirty kilometres [upstream] to the confluence of the torrent Sittona, erroneously called Maiteb in the Dechaurand [*sic*] used as the basis for the treaty, I enclose the existing sketch with this courier.

5.61 It is difficult to be sure which sketch is here referred to as "the existing sketch." But this may not matter, since three days later Martini sent a further message to Rome, on 13 January 1906, transmitting a "Copy of the sketch of the Afra region territory to the East of the previous one, that includes the zone where the border between Eritrean [*sic*] and Adiabo should be marked." This sketch could have been the one prepared by Pollera two years previously because it bears the heading "Schizzo Administrativo Della Regíona di Afra" and is the only one in the record that so specifically mentions Afra (see para. 5.52, above).

Martini report, 1907

5.62 In 1907, Martini filed a further Administrative Report in which he said:

> With the acquisition of the Cunama by Eritrea, it was necessary to institute the residence of the Gash and Setit, which was established in 1903.
>
> Considering that I had given a stable administrative organisation to the Colony, which followed the needs of the population and of the government, I had some studies done so that we could precisely define the territory and the people assigned to every regional office, and dependent on it. I therefore provided for the publication of the Gubernatorial Decree no. 202 (attach. No. 1)[49] of May 9, 1903, in which that delimitation was determined.
>
> To clarify the situation further, I also requested the publication of some special maps that represented geographically the territory and the people assigned to the different regional offices.
>
> . . .
>
> With the appropriate arrangements with the Negus, I provided for the constructions of two big roads: one that from Agordat Eimasa Elaghin reaches our border on the Setit and then continues within Ethiopia as far as Nogarra; the other also departing from Agordat, for Barentu, Ducambia on the Gash, *reaches the confluence of the Sittona on the Setit, after which it continues beyond our border into Birgutam* and Cabta to end in Gondar.
>
> . . .
>
> As I mentioned before, the construction of these two roads, *in the areas located inside our territory*, was also necessary for political reasons, in that they also *served the purpose of demonstrating* to the lesser and greater chiefs *our occupation of the new territories given to us by the Negus.*[50]

Italian maps, 1907

5.63 It is not possible to identify with confidence the maps to which Martini was referring. There were, however, in that year, three further Italian maps. One, on a scale of 1:500,000 over the names of M. Checchi, G. Giardi and A. Mori, showed the same line as the 1904 map, leaving the Setit at the confluence of the Tomsa at an angle of 23°. This map carries the legend "Pubblicata a cura della

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[49] See para. 5.50, above.

[50] Commission's emphasis.

Direzione Centrale degli Affari Coloniali." The same Checchi map of 1907 was used in the same year, and on the same scale, under the title "Distribuzione del Bestiame nelle varie regioni della Colonia Eritrea." The same line appears on a smaller scale Checchi map (1:4,000,000), showing lines of communication between Eritrea and Ethiopia and again in two further Checchi, Giardi and Mori maps of 1907, one on a scale of 1:800,000 specifically naming the Tomsa and the other showing roads and distances on a scale of 1:1,500,000, both published by the Directorate of Colonial Affairs.

Concessions map, 1909

5.64 An Italian map of the Principal Concessions for Minerals in Ethiopia, undated, by Carol Rosetti, who also produced a general map of the area in 1909 for the Istituto Geografico de Agostini shows the Eritrean line with the name "Cunama" covering the whole area between that line and the border with Sudan.

Ethiopian map, 1923

5.65 The only direct assertion in evidence before the Commission by Ethiopia of its claim line is to be found in the so-called "Haile Selassie map" of 1923, by Kh. B. Papazian. This shows the Setit-Mareb link as running from what appears to be the western Maiteb to Point 9 at an angle of approximately 70° from true north.[51]

Ethiopian note, 1927

5.66 On 13 August 1927, Tafari Mekonnen, in a note to the Italian Minister in Addis Ababa, recalled that he had agreed with Mussolini in 1924/1925 that it would be appropriate promptly to demarcate the border, and he asked to be notified immediately of Italian concurrence "in order promptly to accomplish this effort." This request was repeated on 6 March 1929.

Pizzolato report, 1929

5.67 A report dated 25 January 1929 by Commissioner Pizzolato and entitled "Recognition of a line of small posts at the border with the Adi Abo" starts by saying that he gathered soldiers at Biaghela, at Sittona and at Acqua Morchiti – all of which lie southeast of the Ethiopian claim line. He wrote of being able "to show the soldiers that all our march was taking place in Italian territory." He mentioned arriving at Acqua Odas where there still existed a small fort that had been garrisoned until 1917. He told of his meeting with a local tribal chief whose "country lies deep within Italian territory" and asked him to explain to other chiefs that Italy had "in the past had small posts at Acqua Odas, Acqua Bar and

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[51] The Italian understanding of what was believed to be the Ethiopian claim line in 1931 is illustrated on a map accompanying Governor Zoli's report of 25 January 1929; see para. 5.68, below.

Acqua Morchiti. Subsequently, given the good relations with the Ethiopian Government, the small posts had been closed." Pizzolato indicated to the same chief that because of the cattle raids in the area, "the old small posts would be put back again." He concluded by saying:

> If we only want to be content with a certain surveillance over the very vast zone the small posts would have to be put back where they were in the past and staffed with some fifty men each.

The map dated the same day and described in paragraph 5.71, below, illustrates and bears out Pizzolato's remarks.

Zoli report, 1929

5.68 By a letter dated the same day as Pizzolato's report, 25 January 1929, Zoli, the Governor of Eritrea, reported to the Minister of Colonies on the current border situation between Ethiopia and Eritrea. He referred to doubts as to whether "Maiteb," 30 km east of Ombrega, or the "Meeteb," a further 100 km east, should be regarded as the river mentioned in the 1902 Treaty, which he called "the Additional Note." Zoli said:

> But the condition – clearly expressed in the Additional Note – that the border between the Setit and the Gasc must be traced on the site "so that the Cunama tribe will remain with the Eritrean Colony" does not leave any doubts regarding the negotiators' intention and regarding the fact that the "Maiteb" of the Additional Note must be identified with the second stream "Meeteb" indicated on our maps; because the Cunama tribe extended – and still extends – territorially east of the Ambessa-Mareb-Meeteb confluence line, and considerably south of the Ambessa-Mareb-Mai Teb confluence line.
>
> It appears that the lack of precision and the unfortunate wording of the Additional Note are derived from the fact that (to prepare it) the negotiators naturally used the border region maps existing at that time and [illegible] . . . .
>
> In those maps the course of the Setit and the oro-hydrographic system of the surrounding region are represented in a completely erroneous manner.

5.69 Zoli then went on to identify the elements of the 1902 Treaty that might be useful in identifying the borders of the area. He observed

> . . . that it certainly was Menelik's intention to cede the entire Cunama territory to Italy, which at that time also included the village of Aifori (later raided and destroyed . . .), which was located precisely in the small hollow directly west of the above mentioned q. 636 (approximately 7 kilometres northwest of the confluence of the second "Meeteb" with the Setit), as well as the entire Afrà region

(approximately thirty kilometres in a straight northeast line from said confluence) used by the Cunama for the rubber harvest.

5.70 Zoli also said

> [F]inally, the memory of former officials of this Government shows that the Emperor Menelik – in addition to the text of the Rider of May 15, 1902 – also set his seal on one map which showed the border between the Gasc and the Setit more or less in the position in which it is marked in the IGM 400,000 scale map – 1910 edition.

5.71 Zoli's report was accompanied by a map of the region between the Setit and the Mareb which is of interest in a number of details:

(i) It marks the name "Cunama" across the whole of the region, extending as far east as the river "Gongoma," a tributary of the Mareb joining that river upstream of the Mai Ambessa (Point 10). The "Adi Abo" region, by contrast, lying to the east of the Cunama, is clearly marked as lying east of the Gongoma in the north and of the Tomsa (Point 6) in the south.

(ii) The map shows a river "Mai Teb" corresponding to the western Maiteb, joining the Setit at approximately Point 3. It also shows a river called "Meeteb" flowing into the Setit further east (at about Point 5) between the Sittona (Point 4) and the Tomsa (Point 6).

(iii) Three lines are drawn on this map:

- One runs from a point some distance up the western Maiteb to the Mareb/Mai Ambessa confluence (Point 9) at an angle of approximately 62°-64° from true north. This is labelled "Confine secondo l'interpretazione abissinia." (This appears to be only the second document in evidence that indicates the Ethiopian claim line, the other being the 1923 "Haile Selassie" map; see above, para. 5.65). This line cuts right across the middle of the name "Cunama."

- A second line runs southwestwards from the Mai Ambessa/Mareb confluence (Point 9) straight towards the confluence of the Tomsa and the Setit (Point 6). Shortly after crossing the Sittona (Point 4), it reaches the "Meeteb" which it follows to Point 5. If at the point where the straight line joins the Meeteb it had been extended in a straight line, it would have reached the Setit exactly at the confluence of the Tomsa (Point 6). This line is described as "Confine secondo la nostra interpretazione." Its angle from true north is about 25°.

- The third line runs in a very shallow "S," sloping from near Point 9 initially towards the west and then southwest, crossing the Abyssinian claim line to reach the Setit a short distance southeast of the confluence of the Sittona (Point 4). This line is marked "Limite attuale

della nostra occupazione effettiva." The whole of the area between the Abyssinian and Italian claim line is shaded as "territorio contestato."

(iv) The map also indicates the location of a number of military posts that lie to the southeast of the Abyssinian claim line. Three of these, lying between the Abyssinian claim line (to the west) and the line of present Italian occupation (to the east) are marked as being presently occupied by Italy. Another three, lying between the line of Italian occupation (to the west) and the boundary according to the Italian interpretation (to the east), are marked as having been recently unoccupied.

(v) A place marked "Reg. Aifori" lies just south of the Setit to the west, a short distance downstream from the Meeteb confluence (Point 5).

Ethiopian note, 1929

5.72 Some weeks later, on 6 March 1929, twenty-seven years after the Treaty, the Ethiopian Government informed the Italian Government that it had selected engineers and experts "who are delegated on our part to demarcate the boundary" and calling on the Italian Government to do the same. There is no evidence of any Italian response.

Zoli's second report and map, 1929

5.73 A further report of Governor Zoli of 25 April 1929 was accompanied by an "Assetto del Confine tra Gasc e Setit" which carries the following features:

(a) It draws the boundary as a straight line from the Mareb/Mai Ambessa confluence at Point 9, southwestwards at an angle of approximately 23° from true north until, after crossing the Sittona, it reaches the "Meeteb," and then follows its course to its confluence with the Setit at Point 5 (if the straight line had been continued beyond the Meeteb, it would have reached the Setit at or near the mouth of the Tomsa (Point 6).

(b) It marks a number of Italian military posts in the area between the Ethiopian claim line and the boundary as represented by Zoli: just south of the Mareb, opposite Boscioca (15 men); at M. Gongoma (10 men); at Acqua Odas (20 men); at Acqua Morchiti (25 men); at Foce Sittona (10 men); and at Biaghela (10 men).

Ethiopian protest, 1931

5.74 On 2 May 1931, the Ethiopian Minister of Foreign Affairs complained that Eritrean soldiers had crossed "through Adiabo and killed Ethiopian citizens at Mai Tani" and asked that Eritrean soldiers "be forbidden in the future from crossing the frontier and repeating similar acts."

Denti di Pirjano report, 1932

5.75 In May 1932, the Regional Commissioner of the Western Lowland, Denti di Pirjano, reported to the Governor of Eritrea on an excursion that he had made into Adiabo. This report is accompanied by a sketch map which shows the Sittona, the Tomsa and the boundary running from the northeast to join the Setit at Point 6. The Mai Ten is described in the text in some detail and a corresponding watercourse appears on the sketch but is not named. It is clear, however, that this watercourse is some 15 km southeast of Point 6 and is in Ethiopian territory. Though the text of the report does not contain any description of Cunama territory as such, it does refer to the Cunama near the Meeteb, and reports finding the ruins of a destroyed Cunama village at a point which would appear to lie east of the Eritrean claim line. While clearly evidencing the absence there of Cunama at that time, it does suggest that Cunama had lived there earlier.

Incidents, 1932

5.76 In 1931-1932, there appear to have been various incidents in the area of Mochiti and Gongoma that generated oral exchanges in which Ethiopia sought Eritrean withdrawal from Mochiti. Eritrea declined to do this and requested Ethiopia to order its men to abstain from further movements.

5.77 On 11 January 1932, the Eritrean Governor, Queirolo, restated in relation to an incursion by Ethiopian tribesmen in the region of "Acque Etana," which was near the Mai Ten, that the line of the Eritrean border in the region

> starts from the junction of the Tomsa with the Tacazzé and passing at about three kilometres from Acque Etanà, proceeds until it passes between Acque Odas and Mount Garantta, at about three kilometres from the latter, and through altitude 1137 of Mount Erenni reaches the junction of the Gasc with Mount Bosioca. (Point 9).

5.78 The same report concluded by noting that the Ethiopian "chiefs of council" had requested a meeting with the Italian Agent at Adme to propose mutual withdrawal of troops from the locality of Acqua Morchiti, to leave it unoccupied pending the decision of a possible boundary commission delimitation. The Italian Agent answered that "the Italian Government cannot abandon locality that according to Treaty is left in Eritrean territory." Again, this report indicates that this dispute was about the most eastern area of the Eritrean claim and that the Ethiopian claim was being made further to the west in the direction of the Ethiopian claim line.

5.79 The next day, 12 January 1932, the Ethiopian Ministry of Foreign Affairs complained of the entry of Italian soldiers into the Adi Hagerai and proposed that both sides retreat to their former positions. The Ethiopian note, as translated in the annexes to the Ethiopian Counter-Memorial, notified Italy that the relevant "section of the boundary starts on the southwestern side, from where the river Maiteb flows into the Setit, up to the place where Mai Ambessi flows into the

Mareb." However, this note was stated by Moreno on 18 March 1932 actually to be referring to the Maiten, not the Maiteb. The Ethiopian Foreign Ministry rejected the reference by Italy to a treaty of 1917/1918, saying that it had no knowledge of such a treaty.

5.80 Again, three days later, on 15 January 1932, the Ethiopian Ministry of Foreign Affairs referred to unexpected clashes in the area of "Moketti" (Mochiti) and reasserted the need for the boundary to be marked on the ground. The note concluded:

> With regard to this section of the border, what has already been done until today, until the land is marked, we cannot accept as final.

As indicated in a telegram of 23 January 1932, from the Italian Ministry of Foreign Affairs to the Italian Ministry of Colonies, the reservation by Ethiopia of its position was clearly understood.

Italian protests, 1935

5.81 In May 1935, Italy protested to Ethiopia about the killing of one of its soldiers who was taking water from the Sittona, near Gogula. Ethiopia replied that it would make enquiries, but did not question that the location was in Eritrea.

3) <u>Assessment of the situation as at 1935</u>

5.82 Having regard to the history of the relations between Italy (Eritrea) and Ethiopia in and after 1935 and to the nature of the evidence available both before and after that date, the Commission considers that an assessment of the legal position should properly be made as it stood on the eve of the Italian invasion of Ethiopia in 1935.

5.83 On the basis of its consideration of the evidence recalled above, the Commission has reached the following findings:

(i) Although Article I of the 1902 Treaty refers to a river called the Maiteb, the explicit object and purpose of the Treaty, namely, the assignment to Eritrea of the Cunama tribe, clearly indicates the intention and "common will" of the Parties that the boundary river should not be the western Maiteb.

(ii) The evidence, though inexact, indicates that the territory of the Cunama extended far to the east and southeast of the Ethiopian claim line, which runs from Point 3 to Point 9.

(iii) The negotiators had sufficient knowledge to identify the general limits on the sole map that the evidence indicates was before them during their discussions, the so-called "Mai Daro" map. This map, showing the area between approximately 37° 17' in the west and 37° 59' in the east, identified

by name certain features, the names of which were then used in the Treaty. In the south they were the Tacazzé-Setit; one of its tributaries, named "Meeteb"; and a mountain named "Ala Tacura" lying to the north west of that river. In the north, the relevant features were the Mareb, joined by its tributary, the Mai Ambessa. In addition, giving its name to the map, was marked a locality called "Mai Daro" inside, and just to the south of, a distinctive broad inverted U-shape bend in the Mareb, northwest of the Mareb/Mai Ambessa confluence.

(iv) Thus, the river named "Meeteb" on the "Mai Daro" map is not the western Maiteb, used by Ethiopia as the southern end of its claim line. The misnaming of the river on the map is demonstrated by the following features:

(a) The stretch of Setit shown on the map lies between approximately 37° 17' and 37° 41'. The map shows the eastern sector of a major bend in the river that lies a significant distance east of the junction of the Setit and the western Maiteb at Point 3.

(b) The river named as the Meeteb has a different and longer east-west course than the western Maiteb.

(c) The relative location of the place named Mai Daro, its bend in the Mareb, and the confluence to the southwest of the named "Meeteb" with the Setit do not correspond with the relative location of Mai Daro and the western Maiteb as drawn on other maps available in 1902.

(d) The angle of the pecked line joining the "Meeteb" and the Mareb is approximately 45° from true north, whereas the angle of the Ethiopian claim line is 68°.

(e) There was in existence in 1902 a map, the de Chaurand map of 1894, which was used as the basis for the map annexed to the 1900 Treaty. That shows a river similarly located and shaped like the "Meeteb" but does not show any other Maiteb to the west.

5.84 The Commission is satisfied that the negotiators did not have in mind as the boundary the Ethiopian claim line running from Point 3 to Point 9.

5.85 The Commission considers that the river named "Meeteb" in the Mai Daro map is really the Sittona, which flows into the Setit from the northeast at Point 4 along a primarily east-west course and that the name "Meeteb" was wrongly attached to it. The Commission therefore interprets the name "Maiteb" in the 1902 Treaty as being the present-day "Sittona."

5.86 The line running from the river "Meeteb"on the Mai Daro map northeast to the Mareb/Mai Ambessa confluence is a pecked line that reflects the indication in the Treaty that the line from the Setit to the Mareb was yet to be delimited, thus

evidencing the uncertainty of the negotiators regarding the limits to be attributed to the Cunama.

5.87 That delimitation was not effected. Reading together the provisions of the 1902 Treaty and Article 4, paragraph 2, of the December Agreement, the Commission considers that it must produce a final delimitation of the whole border between Ethiopia and Eritrea. In carrying out this task, the Commission has had regard to the colonial treaties and factors that are relevant according to applicable international law.

5.88 The Commission has taken into account the many maps presented to it in evidence, but has only given weight in relation to this sector to maps produced by the Parties themselves in the period prior to 1935. It has noted that three early Italian maps show the Ethiopian claim line, as does one Ethiopian map of 1923. However, all the other relevant maps show the Eritrean claim line in accordance with what has, in the present proceedings, come to be called the "classical" or "traditional" signature characterized by a straight line from the confluence of the Tomsa with the Setit (Point 6) to Point 9 at an angle of about 28° from true north. There is no record of any timely Ethiopian objection to these maps and there is, moreover, a consistent record of Ethiopian maps showing the same boundary. These maps amount to subsequent conduct or practice of the Parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line.

5.89 Another way of viewing the line so consistently shown on these maps is that it also serves to evidence the acceptance by the Parties of that line as the eastern limit of Cunama territory transferred to Eritrea by the 1902 Treaty. Though some of the evidence suggests that the classical line accords more territory to Eritrea than the Cunama actually occupied, some of it also indicates that the classical line leaves part of the Cunama territory in Ethiopia. This being so, the Commission determines that the eastern border of Cunama territory between the Setit and the Mareb coincides with the classical signature of the border as marked on the maps. There is no evidence sufficiently clear or cogent to lead the Commission to a different conclusion.

5.90 In short, the Commission concludes that as at 1935 the boundary between the Setit and the Mareb had crystallized and was binding on the Parties along the line from Point 6 to Point 9. The question that remains for consideration is whether any developments since that date affect the above conclusion.

4) The Position after 1935

5.91 The Commission has examined the major elements in the course of events since 1935: the Italian invasion of Ethiopia; the outbreak of the Second World War; the British military occupation of Eritrea; the post-war developments including the treatment of the political future of Eritrea; the creation of the federation between Ethiopia and Eritrea; and the eventual termination of that federation. However, the Commission can perceive nothing in that chain of developments

that has had the effect of altering the boundary between the Parties. The boundary of 1935 remains the boundary of today.

5.92 However, there is one specific body of material to which the Commission has given careful consideration, namely, the Ethiopian evidence of its activities in the area west of Eritrea's claim line. The Commission notes that no evidence of such activities was introduced in the Ethiopian Memorial. The evidence to be examined appeared only in the Ethiopian Counter-Memorial. It was not added to or developed in the Ethiopian Reply.

5.93 The places in which Ethiopia claimed to have exercised authority west of the Eritrean claim line are all, with two exceptions, clustered in the northeast corner of the disputed triangle of territory. The most westerly location is Shelalo. The Commission observes that the area of claimed Ethiopian administrative activity comprises, at the most, one-fifth of the disputed area. The area of claimed administration does not extend in any significant way towards the Ethiopian claim line.

5.94 The Commission observes, secondly, that the dates of Ethiopian conduct relate to only a small part of the period that has elapsed since the 1902 Treaty. There are some references to sporadic friction in 1929-1932 at Acqua Morchiti. Apart from those, the material introduced by Ethiopia dates no further back than, at the earliest, 1951 – a grant of a local chieftaincy to an Ethiopian general. Even this grant, in specifying the places sought by the general, namely, Afra, Sheshebit, Shelalo, from Jerba up to Tokomlia, Dembe Dina and Dembe Guangul, described them as "uninhabited places" which the general wanted to develop. The evidence of collection of taxes is limited to 1958 and 1968. In 1969 there is a reference to a table of statistics about the Adiabo area, but of the places mentioned in the table only two appear to be marked on the Ethiopian illustrative figure of the claimed region. One item dating from 1970 refers to the destruction of incense trees. There is some evidence of policing activities in the Badme Wereda in 1972-1973 and of the evaluation of an elementary school at Badme town. There are, in addition, a few items dating from 1991 and 1994.

5.95 These references represent the bulk of the items adduced by Ethiopia in support of its claim to have exercised administrative authority west of the Eritrean claim line. The Commission does not find in them evidence of administration of the area sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that had crystallized as of 1935.

5.96 The Commission's conclusions regarding the 1902 Treaty line as a whole will be found in Chapter VIII, paragraph 8.1, sub-paragraph A.

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CHAPTER VI – THE SECTOR COVERED BY THE 1908 TREATY (EASTERN SECTOR)

6.1 The third of the "pertinent colonial treaties" specified in Article 4, paragraph 2, of the December Agreement is the 1908 Treaty. According to the penultimate paragraph of Article VII of this Treaty, it was "done in duplicate and in identic terms" in Italian and Amharic.[52] Each Party was satisfied that the English translation accurately stated the content of that Treaty. Accordingly, the Commission has used the English translation.

A. THE TEXT OF THE 1908 TREATY

6.2 The six substantive provisions of the 1908 Treaty divide into two distinct though related subjects. With respect to the boundary delimitation, Article I of the 1908 Treaty states:

> From the most easterly point of the frontier established between the Colony of Eritrea and the Tigre by the Treaty of the 10th July, 1900, the boundary continues south-east, parallel to and at a distance of 60 kilometers from the coast, until it joins the frontier of the French possessions of Somalia.

The effect of Article I is thus to establish a geometric method of delimitation.

6.3 Article II of the 1908 Treaty states:

> The two Governments undertake to fix the above-mentioned frontier-line on the ground by common accord and as soon as possible, adapting it to the nature and variation of the terrain.

6.4 With respect to the management regime for the resulting boundary, Article III of the 1908 Treaty states:

> The two Governments undertake to establish by common accord and as soon as possible the respective dependence of the tribes bordering the frontier on the basis of their traditional and usual residence.

6.5 Article IV of the 1908 Treaty states:

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[52] Both Parties produced copies of the Treaty in the original languages as well as in the English translation that had been published in successive editions of Hertslet's *Map of Africa by Treaty* (E. Hertslet, *The Map of Africa by Treaty*, Vol. 3 (3d ed., 1967)). However, all of the Parties' respective written and oral submissions were made only with reference to the English translation. In marked contrast to the considerable discussion of the meaning and legal significance of the differences between the Amharic and English and Italian texts of the 1902 Treaty, neither Party alleged discrepancies between the Amharic and Italian versions of the 1908 Treaty.

> The two Governments undertake to recognise reciprocally the ancient rights and prerogatives of the tribes bordering the frontier without regard to their political dependence, especially as regards the working of the salt plain, which shall, however, be subject to the existing taxes and pasturage dues.

The primacy of the geometric method of delimitation is reinforced in this provision. Prior *effectivités*, which might have been adduced to determine the location of the boundary, are recognised prospectively only as the basis for transboundary rights, but are not to play a role in the calculation as to where the boundary is located. This intention of the Parties in 1908 was based on the assumption that there would be an expeditious demarcation in accordance with Article II "as soon as possible." No demarcation ever took place.

6.6 Article V of the 1908 Treaty states:

> The two Governments formally undertake to exercise no interference beyond the frontier-line, and not to allow their dependent tribes to cross the frontier in order to commit acts of violence to the detriment of the tribes on the other side; but should questions or incidents arise between or on account of the tribes bordering the frontier the two Governments shall settle them by common accord.

6.7 Article VI of the 1908 Treaty states:

> The two Governments mutually undertake not to take any action, nor to allow their dependent tribes to take any action, which may give rise to questions or incidents or disturb the tranquillity of the frontier tribes.

B. The Physical Geography

6.8 The area covered by this part of the decision was described by Ethiopia as the "most sparsely populated portion of the present-day Ethio-Eritrean boundary" whose "inhospitable terrain is largely inhabited by itinerant peoples, the geographical center of whose social relations are not villages, as in the other portions of the boundary, but instead watering holes, the use of which is shared."

C. Historical Background of the 1908 Treaty

6.9 The Parties agree that the origin of the "sixty kilometers from the coast" formula was a recommendation by Emperor Menelik in 1897 to Major Nerazzini, the Italian negotiator. Eritrea adduced material to sustain its contention that from 1897 until the conclusion of the 1908 Treaty, the "60 kilometres-from-the-coast" formula served as a *modus vivendi*. Some map evidence, which is examined below, supports this contention. Ethiopia did not contest the existence of the *modus vivendi* prior to 1908.

D. THE COMMISSION'S DECISION

6.10 The 1908 Treaty presents the Commission with four issues for decision:

- first, the nature of the exercise under the 1908 Treaty;
- second, the point from which the boundary is to commence;
- third, the point where the boundary is to terminate; and
- fourth, the method by which the boundary is to be drawn.

6.11 Once the Treaty boundary has been determined by application of Article I, two additional issues must be addressed:

- the consequences, if any, of *effectivités* that occurred after 1908 upon the boundary determined by application of Article I; and
- the materiality and weight to be attributed to map evidence insofar as it indicates a departure from the boundary as determined by application of Article I.

6.12 The Commission will take up each of these issues *seriatim*.

1) <u>The nature of the exercise under the 1908 Treaty</u>

6.13 Eritrea has contended that the 1908 Treaty "effected a delimitation" and that "all that remains to be done is to apply the Article I delimitation formula to a map of the area." Ethiopia contested this assertion.

6.14 The Commission considers that Eritrea's contention is not well-founded. Article 4, paragraph 2, of the December Agreement prescribes a general mandate "to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law." This applies to all three treaties and does not introduce any qualification with respect to any one of them. Moreover, the boundary which was purportedly "delimited" in 1908 was not a natural boundary, such as an identifiable river or watershed, but was only a formula, the application of which required a series of subsidiary decisions on other critical matters, e.g., the meaning to be attributed to the word "coast" in Article I, and the point at which the boundary was to commence. The answers to those questions, which would necessarily affect the location of the boundary, make the implementation of Article I of the 1908 Treaty one of both delimitation and demarcation.

2) The commencement of the boundary

6.15 With respect to the question of where the boundary is to commence, Article I of the 1908 Treaty prescribes "the most easterly point of the frontier established between the Colony of Eritrea and the Tigre by the Treaty of the 10th July, 1900." The Commission has determined "the most easterly point" to be Point 31, where the Muna reaches its terminus in the Salt Lake. Accordingly, the boundary of the 1908 Treaty commences at that point.

3) The termination of the boundary

6.16 Article I of the 1908 Treaty provides that the boundary, running southeast and at a distance of 60 km from the coast, continues until it joins "the frontier of the French possessions of Somalia." The reference to "the French possessions of Somalia" is understood by the Parties to refer to the State of Djibouti, which has succeeded to "the French possessions of Somalia." The 1908 Treaty does not establish a particular place on the frontier with Djibouti which would become a tripoint by virtue of the Treaty of 1908, but relies upon the 60 km formula to establish the location of the tripoint. The termination of the boundary of the 1908 Treaty at its easternmost extremity is the point, 60 km from the coast, where the boundary line meets the frontier of Djibouti. The exact location of this point (Point 41) will be specified in the demarcation phase, taking account of the nature and variation of the terrain as well as the precision made possible by large-scale survey maps.

4) The method by which the boundary is to be drawn

(a) *The geometric character of the delimitation*

6.17 With respect to the question of the method by which the boundary is to be delimited and demarcated, Article I, as explained above, prescribes a geometric method, with no reference to possible adjustment of the geometrically produced boundary because of prior *effectivités* that might be demonstrated by one party or the other. While Article II contemplates departures from the geometric method of Article I in the course of demarcation, those departures are only permissible to take account of "the nature and variation of the terrain." This directive is reinforced by Articles III and IV, respectively. Article III establishes that, rather than establishing the boundary by reference to "the dependence of the tribes bordering the frontier on the basis of their traditional and usual residence," the respective dependence of the tribes will be established *after* the boundary has been established. Similarly, Article IV establishes that "the ancient rights and prerogatives of the tribes bordering the frontier," rather than influencing the location of the boundary, will continue to be recognized reciprocally by the parties to the 1908 Treaty. Nor will the location of the boundary, as determined by the prescribed treaty procedure, affect existing taxes and pasturage dues with reference to the working of the salt plain. In sum, the Commission concludes that the mode of delimitation prescribed by Article I of the 1908 Treaty is geometric,

excluding *effectivités* prior to 1908, with adjustments to the geometric line to be made only to take account of the nature and variation of the terrain.

(b) *The delimitative character of the Commission's task*

6.18 Eritrea has contended that the boundary has already been delimited by the arcs of circles method, as evidenced by many maps produced since 1908, while Ethiopia contended that the boundary has not been delimited and that the mandate of the Commission was to delimit *de novo* based upon the 1908 Treaty. In fact, the differences between the Parties on this point proved illusory, as Eritrea also proposed a *de novo* delimitation, and the method it proposed – the arcs of circles – does not produce a result that is wholly congruent with many of the maps that it entered into evidence. In view of the mandate in Article 4, paragraph 2, of the December Agreement, the Commission views its task at this stage as being one of delimitation.

(c) *The meaning of the "coast"*

6.19 The first question that arises in the application of Article I of the Treaty is the definition of the coast. Ethiopia abandoned its conception of the coast as including islands and submitted in its concluding argument that "the coastline" should be understood as "adhering continuously to the continent itself, and not any coastlines of islands as such." This was also the position presented by Eritrea. As the Parties are in agreement on this point, the Commission will take as the coastline the line adhering to the continent itself, and not any coastlines of islands.

(d) *The Commission's delimitation method*

6.20 The respective methods which Eritrea and Ethiopia proposed for implementation of Article I of the 1908 Treaty are striking in that in many sectors of the proposed boundary they produce congruent or nearly congruent results. As will be recalled, Article I provides, in relevant part, that "the boundary proceeds . . . parallel to and at a distance of 60 km from the coast." Ethiopia's method is to create a construct of the coast, at the coastline, and then move this construct inland 60 km, where it still has to be readjusted to take account of certain problems inherent in the method itself, even before it has to be adjusted, once again, in the demarcation phase under Article II in order to adapt it "to the nature and variation of the ground." Eritrea's method also produces a simplified representation of the coast, in this instance by application of the arcs of circles method. Eritrea then moves the result inland for the prescribed 60 km. Even the software programs that Eritrea proposes, which allow a large number of arcs of circles to be drawn, produce nonetheless a construct rather than a facsimile of the coast. Both methods, which purport to be objective, actually import a measure of subjective choice.

6.21 In the opinion of the Commission, the optimum means for implementation of Article I of the 1908 Treaty is to take a satellite image of the coastline of Eritrea in the area covered by the 1908 boundary and to move it inland for a distance of 60 km -"coast" being understood here as set out in paragraph 6.19, above. To move the line inland in a rational manner, a straight line, running from the Eritrean-Djibouti boundary at the point at which it intersects with the coast in the southeast to the appropriate point in the northwest on the coast opposite the eastern terminus of the 1900 Treaty, will produce a line describing the general direction of the coast in this sector. In order to determine the appropriate point on the coast at the eastern terminus of the 1900 Treaty, an arc with a radius of 60 km is drawn from the terminus point where the Muna meets the Salt Lake (Point 31). The point where this radius intersects with the coast provides the northernmost point for determining the general direction of the coast. Two lines, each 60 km in length, projected perpendicularly from each end of this line provide the points inland upon which the satellite image of the coast may be set. The result will be a line every point of which is exactly 60 km inland from the nearest point on the coast. Each sinuosity of the coast will be reproduced exactly on this inland line and each will be precisely 60 km inland from the corresponding sinuosity on the coast.

6.22 While the result of the first step of the delimitation exercise produces a line that is faithful to the language of Article I of the 1908 Treaty, the replication of the sinuosities of the coast on the inland line does not produce a manageable boundary. The Parties before the Commission indicated that each expected the Commission to make such adjustments in the boundary as would be necessary to render it manageable and rational.[53] To this end, the Commission has designated nine points, Points 32-39 and Point 41, of which the coordinates are set out in Chapter VIII, paragraph 8.3, and are illustrated on Map 12 (see below, p. 100). As explained in paragraphs 6.30-6.32, below, an adjustment of the Treaty line is required to meet the situation at Bure. Accordingly an additional point will need to be added there, which will be Point 40.

5) Effect of subsequent conduct

6.23 Having determined the boundary by the geometric method prescribed by the Treaty, the Commission now turns to consider whether any subsequent conduct adduced by the Parties requires the Commission to vary the boundary.

6.24 The Commission will not address the *effectivités* adduced by the Parties with respect to activities prior to the conclusion of the 1908 Treaty, as the terms of the Treaty make it clear that the Parties intended that the effect of such activities should not be taken into account.

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[53] In this regard, it may be noted that all the maps adduced to show the boundary in this sector from the time of the 1897 *modus vivendi* simplified the line in a variety of ways to achieve a manageable and rational boundary.

6.25 As to the *effectivités* adduced for the period since 1908, these essentially reinforced the geometric line, in the sense that they established that activities conducted by Ethiopia and Italy (or Eritrea, after the latter's independence), *à titre de souverain*, did not take place anywhere that would have required an adjustment of the boundary determined by the geometric method. Thus, Eritrea contended in its Memorial that Ethiopian customs posts at Maglalla, Fiscio, Barale and Dildi were located to the west of the Treaty boundary and, moreover, collected import taxes on the salt from the Dankalia salt mines. Eritrea also contended that Ethiopia never objected to the placement of Italian guardposts "on the border line at Km. 60." Eritrea also contended, and provided extensive tax lists in support of its contention that residents of the Bada and northern Dankalia region paid taxes to it. But Eritrea also stated that these residents were found "in Bada, an area in northern Dankalia approximately 50 km from the coast."

6.26 Eritrea adduced evidence to show that it built roads and railroads as well as telegraph and telephone lines as far as the border. But an examination of the maps adduced in support of this shows that the railroads and telegraph lines were on the coastal side of the geometric boundary. Similarly, the evidence of guard posts established by Italy to protect the people of southern Dankalia within Italian jurisdiction shows that all of those posts were also on the coastal side of the 1908 Treaty boundary as determined geometrically.

6.27 With respect to the Bada region, both Parties adduced as *effectivités* evidence of administration of elections in the Bada region. The Commission encountered difficulties in assessing the weight to be assigned to such claims. As Ethiopia observed, the Bada region is large and its extent is not clearly defined. Some parts of Bada are plainly Eritrean and some plainly Ethiopian. Insofar as any particular evidence of activities in this region does not specify precisely where the activities took place, it is of no probative value.

6.28 Eritrea contended that the administrative divisions of Ethiopia set the boundary between Tigray and Afar at the eastern edge of the escarpment, again to the west of the boundary as determined by application of Article I. Eritrea also maintained that a British Military Administration memorandum of 2 January 1943 recorded that rumors of an Ethiopian presence in Bada were investigated but found to be untrue. Without regard to the weight to be assigned to these *effectivités*, the Commission considers that they confirm the geometric boundary rather than require an adjustment to it.

6.29 Ethiopia submitted evidence of a potash concession to an Italian mining engineer named Pastori in 1912 in the Dalul area. But the British documents which Ethiopia adduced locate the deposits 70 km from the Red Sea, which places it on the Ethiopian side of the 1908 Treaty boundary as geometrically determined. Moreover, Ethiopia observed that when the concessionaire was obliged to construct a railway from the Red Sea port, Marsa Fatima, to within 16 km of the mine, the railway stopped on the Italian side of the geometric boundary. Similarly, Ethiopia's claims to salt mines do not appear to relate to the seaward

side of the geometrically determined 60 km line. Other activities in Dalul that Ethiopia claimed to have occurred would appear to lie well to the west of the Treaty line.

6.30 A special situation appears to have arisen with regard to Bure, the historic checkpoint for road traffic between the port of Assab and points in Ethiopia. Bure is located on the Ethiopian side of the 60 kilometre line. Eritrea adduced evidence of an express agreement between the Parties, with corresponding performance, by which after Eritrea's independence they appear to have placed their common boundary at Bure. This agreement took the form of a "report of the study team on opening passenger transport services along the Addis-Assab Corridor" of 7 November 1994 (incorporating a report of 12 July 1994), which was signed by representatives of Eritrea and Ethiopia. Agenda item No. 2 was expressed thus:

> Observe and report working procedures at check point stations and along the route.

The report then continued:

> The main check points along the route are mainly: –
>
> 1. . . .
> 2. . . .
> 3. . . .
> 4. Bure Ethiopian border.
> 5. Bure Eritrean border.
>
> The study team observed the practices and conducted interviews with several officials of both countries on respective procedures towards checking interstate [illegible]. Explained the cooperation need from them for smooth [inter-?] state operation.

An internal Eritrean memorandum of 30 April 1994 (copied to the Ethiopian Embassy in Asmara) referred to "Ethiopian trucks entering Eritrea through the checkpoints both in Zalambessa and Burre." An undated "Directive issued to control automobiles using the roads between Eritrea and Ethiopia" also confirms the existence of the Eritrean checkpoint at Bure.

6.31 It is not unknown for States to agree to locate a checkpoint or customs facility of one State within the territory of a neighbouring State. Such agreements, which reflect a common interest in efficiency and economy, do not necessarily involve a change of the boundary. That, however, was not the situation at Bure after Eritrean independence. The evidence indicates that both Parties assumed the boundary between them occurred at Bure and that their respective checkpoints were manifestations of the limits of their respective territorial sovereignty. The 1994 bilateral Report, quoted above (para. 6.30), expressly designates Bure as the

border point. Accordingly, the boundary at Bure passes equidistantly the checkpoints of the two Parties.

6.32 In the view of the Commission, with the exception of the boundary checkpoints at Bure reflecting a common agreement that the boundary passes between them at that town, none of the other *effectivités* adduced by the Parties was of such weight as to cause the Commission to vary the geometric boundary determined by the Commission in application of Article I of the 1908 Treaty. In relation to Bure, the adjustment is relatively small, requiring only a slight variation of the border reflected in the insertion of Point 40 between Points 39 and 41.

6) The map evidence

6.33 The Commission has carefully reviewed the maps of the eastern sector presented by the Parties. They vary as regards the northwestern starting point of the Treaty line. Many commence at Rendacoma, and some cross through the Salt Lake. Some of the maps designate the boundary by a straight line while others attempt a figurative but highly stylized and impressionistic approximation of the coastline, 60 km inland, leaving it impossible to infer the method, if any, which the map makers were using. While the Commission accepts that maps of boundaries are admissible as evidence (although of varying evidential weight), the diverse boundary delineation in the maps adduced by the Parties, the small scale of many of the maps, and the evident failure on the part of their makers to follow the language of the 1908 Treaty, leads the Commission to the conclusion that they indicate no more than a general awareness and acceptance of the 1908 Treaty and the approximate location of its line. In a negative sense (the evidence of acceptance of an approximate Treaty line notwithstanding), all the maps confirm the absence of a delimitation and demarcation as contemplated by the Treaty. As a result, none of them would lead the Commission to change its conclusion regarding Article I of the 1908 Convention as varied in relation to Bure.

6.34 Hence, other than as stated above with respect to Bure, the line of delimitation which the Commission has determined by application of Article I of the 1908 Treaty will serve as the basis for the demarcation, leaving open the possibility at that stage of "adapting it to the nature and variation of the terrain," as contemplated in Article II of that Treaty.

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CHAPTER VII – THE BOUNDARY LINE WITHIN RIVERS

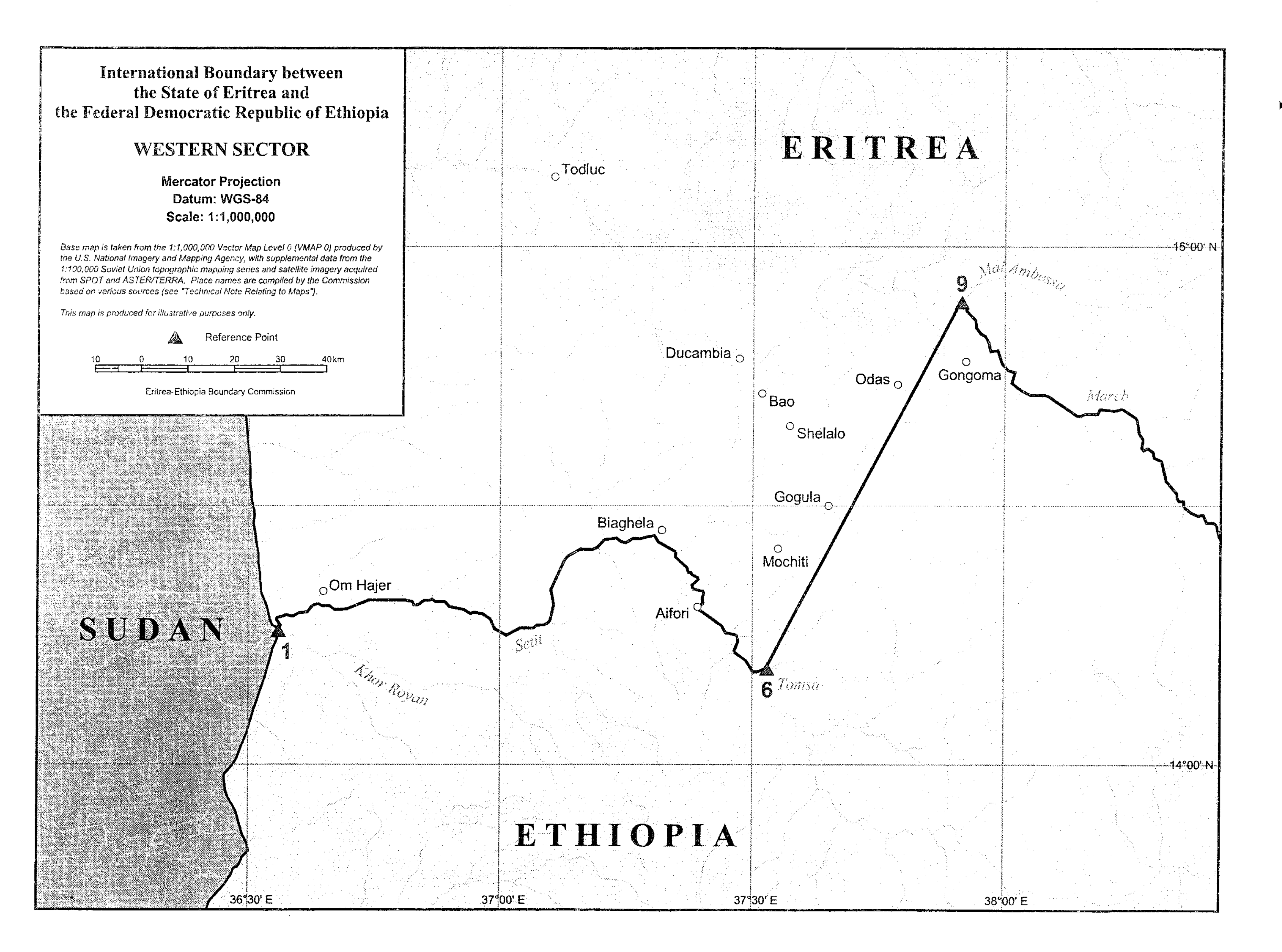
7.1 The 1900 and 1902 Treaties designated rivers as key components of the boundaries they established: from west to east, as named in the Treaties, the Setit, the Mareb, the Belesa and the Muna. The Treaties do not, however, specify where in each river the boundary should be placed.

7.2 The question is one which, during the hearings, the Commission specifically asked the Parties to address. The views expressed by both Parties were similar. Both favoured the adoption in principle of the main channel as the line of division. Neither referred to the line of the deepest channel. Neither favoured the fixing of a permanent line in rivers determined by reference to coordinates. Both favoured the deferment to the demarcation stage of the decision regarding the line within rivers and considered that the Parties should be consulted further on the matter at that stage, bearing in mind, amongst other factors, that different considerations might apply to different parts of the rivers.

7.3 In these circumstances, the Commission holds that the determination of the boundary within rivers must be deferred until the demarcation stage. In the meantime, there will be no change in the *status quo*. The boundary in rivers should be determined by reference to the location of the main channel; and this should be identified during the dry season. Regard should be paid to the customary rights of the local people to have access to the river.

* - * - *

Map 10



International Boundary between
the State of Eritrea and
the Federal Democratic Republic of Ethiopia
WESTERN SECTOR
Mercator Projection
Datum: WGS-84
Scale: 1:1,000,000
Base map is taken from the 1:1,000,000 Vector Map Level 0 (VMAP 0) produced by the U.S. National Imagery and Mapping Agency, with supplemental data from the 1:100,000 Soviet Union topographic mapping series and satellite imagery acquired from SPOT and ASTER/TERRA. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only.
Reference Point
10 0 10 20 30 40km
Eritrea-Ethiopia Boundary Commission
ERITREA
ETHIOPIA
SUDAN
15°00' N
14°00' N
36°30' E
37°00' E
37°30' E
38°00' E
Todluc
Ducambia
Bao
Shelalo
Odas
Gongoma
Gogula
Mochiti
Biaghela
Aifori
Om Hajer
Mai Ambessa
Mareb
Tomsa
Setit
Khor Royan
1
6
9

CHAPTER VIII – *DISPOSITIF*

DECISION

8.1 For the reasons set out above, the Commission unanimously decides that the line of the boundary between Eritrea and Ethiopia is as follows:

A. In the Western Sector

(i) The boundary begins at the tripoint between Eritrea, Ethiopia and the Sudan and then runs into the centre of the Setit opposite that point (Point 1).

(ii) The boundary then follows the Setit eastwards to its confluence with the Tomsa (Point 6).

(iii) At that point, the boundary turns to the northeast and runs in a straight line to the confluence of the Mareb and the Mai Ambessa (Point 9).

B. In the Central Sector

(i) The boundary begins at the confluence of the Mareb and the Mai Ambessa (Point 9).

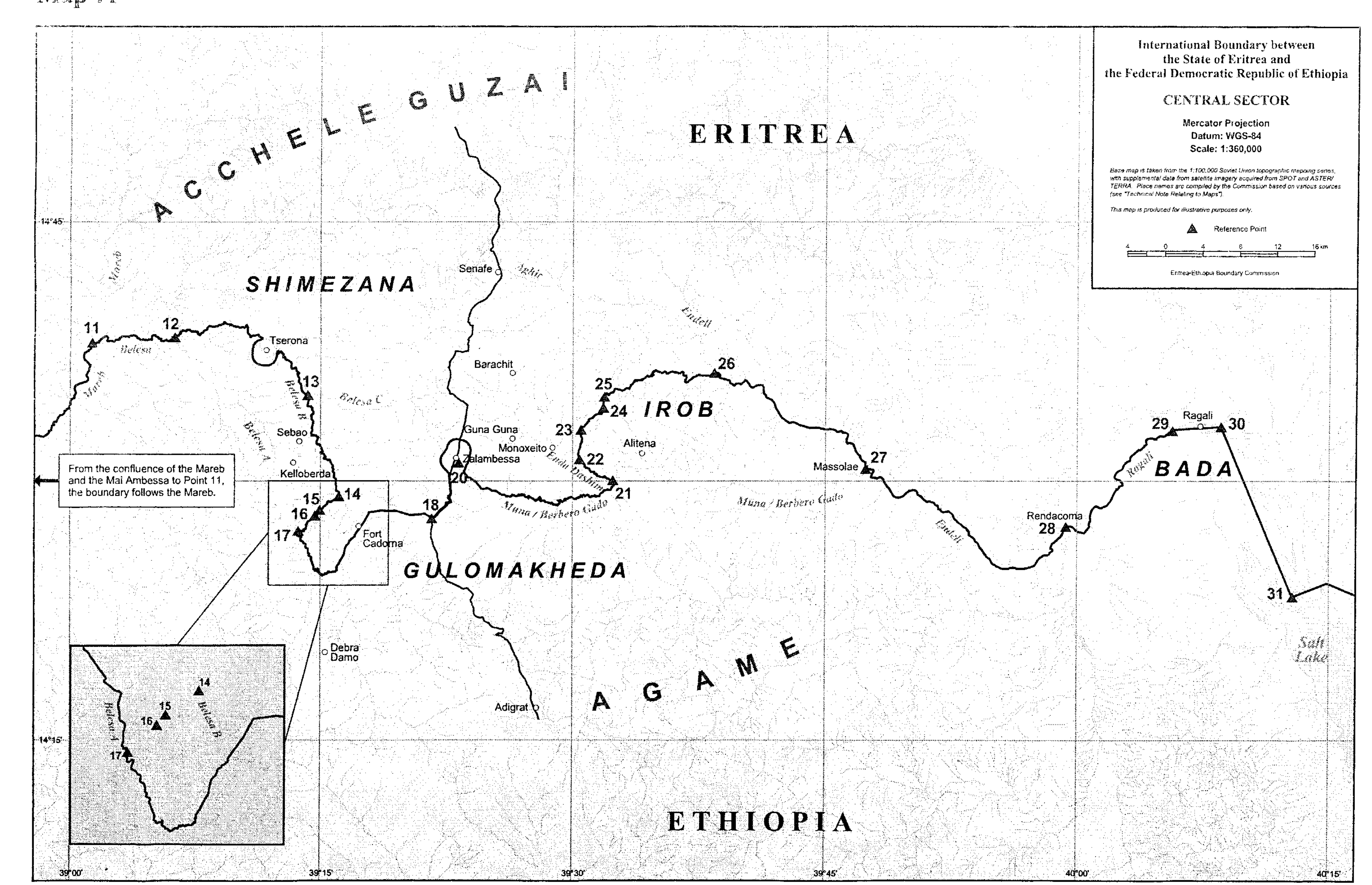
(ii) It follows the Mareb eastwards to its confluence with the Belesa (Point 11).

(iii) Thence it runs upstream the Belesa to the point where the Belesa is joined by the Belesa A and the Belesa B (Point 12).

(iv) To the east and southeast of Point 12, the boundary ascends the Belesa B, diverging from that river so as to leave Tserona and its environs to Eritrea. The boundary runs round Tserona at a distance of approximately one kilometre from its current outer edge, in a manner to be determined more precisely during the demarcation.

(v) Thereafter, upon rejoining the Belesa B, the boundary continues southwards up that river to Point 14, where it turns to the southwest to pass up the unnamed tributary flowing from that direction, to the source of that tributary at Point 15. From that point it crosses the watershed by a straight line to the source of a tributary of the Belesa A at Point 16 and passes down that tributary to its confluence with the Belesa A at Point 17. It then continues up the Belesa A to follow the Eritrean claim line to Point 18 so as to leave Fort Cadorna and its environs within Eritrea. The Eritrean claim line is more precisely depicted on the 1:100,000 Soviet map referred to by Eritrea in its final

Map 11


International Boundary between
the State of Eritrea and
the Federal Democratic Republic of Ethiopia
CENTRAL SECTOR
Mercator Projection
Datum: WGS-84
Scale: 1:360,000
Base map is taken from the 1:100,000 Soviet Union topographic mapping series, with supplemental data from satellite imagery acquired from SPOT and ASTER/TERRA. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").
This map is produced for illustrative purposes only.
Reference Point
4 0 4 8 12 16 km
Eritrea-Ethiopia Boundary Commission
ERITREA
ETHIOPIA
ACCHELE GUZAI
SHIMEZANA
IROB
BADA
GULOMAKHEDA
AGAME
From the confluence of the Mareb and the Mai Ambessa to Point 11, the boundary follows the Mareb.
Senafe
Tserona
Barachit
Guna Guna
Monoxeito
Zalambessa
Alitena
Massolae
Ragali
Rendacoma
Sebao
Kelloberda
Fort Cadorna
Debra Damo
Adigrat
Mareb
Belesa
Belesa A
Belesa B
Belesa C
Aghir
Endeli
Endeli
Endeli
Endu Dashim
Muna / Berbero Gado
Muna / Berbero Gado
Ragali
Salt Lake
11
12
13
14
15
16
17
18
20
21
22
23
24
25
26
27
28
29
30
31
14°45'
14°15'
39°00'
39°15'
39°30'
39°45'
40°00'
40°15'

submission on 20 December 2001. Point 18 lies 100 metres west of the centre of the road running from Adigrat to Zalambessa.

(vi) From Point 18, the boundary runs parallel to the road at a distance of 100 metres from its centre along its western side and in the direction of Zalambessa until about one kilometre south of the current outer edge of the town. In order to leave that town and its environs to Ethiopia, the boundary turns to the northwest to pass round Zalambessa at a distance of approximately one kilometre from its current outer edge until the boundary rejoins the Treaty line at approximately Point 20, but leaving the location of the former Eritrean customs post within Eritrea. The current outer edge of Zalambessa will be determined more precisely during the demarcation.

(vii) From Point 20 the boundary passes down the Muna until it meets the Enda Dashim at Point 21.

(viii) At Point 21 the boundary turns to the northwest to follow the Enda Dashim upstream to Point 22. There the boundary leaves that river to pass northwards along one of its tributaries to Point 23. There the boundary turns northeastwards to follow a higher tributary to its source at Point 24.

(ix) At Point 24 the boundary passes in a straight line overland to Point 25, the source of one of the headwaters of a tributary of the Endeli, whence it continues along that tributary to Point 26, where it joins the Endeli.

(x) From Point 26, the boundary descends the Endeli to its confluence with the Muna at Point 27.

(xi) From Point 27, the boundary follows the Muna/Endeli downstream. Near Rendacoma, at approximately Point 28, the river begins also to be called the Ragali.

(xii) From Point 28, the line continues down the Muna/Endeli/Ragali to Point 29, northwest of the Salt Lake, and thence by straight lines to Points 30 and 31, at which last point this sector of the boundary terminates.

Map 12

International Boundary between
the State of Eritrea and
the Federal Democratic Republic of Ethiopia

EASTERN SECTOR

Mercator Projection
Datum: WGS-84
Scale: 1:1,000,000

Base map is taken from the 1:1,000,000 Vector Map Level 0 (VMAP 0) produced by the U.S. National Imagery and Mapping Agency, with supplemental data from the 1:100,000 Soviet Union topographic mapping series and satellite imagery acquired from SPOT and ASTER/TERRA. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").

This map is produced for illustrative purposes only.

Reference Point

10 0 10 20 30 40 km

Eritrea-Ethiopia Boundary Commission

C. In the Eastern Sector

The boundary begins at Point 31 and then continues by a series of straight lines connecting ten points, Points 32 to 41. Point 41 will be at the boundary with Djibouti. Point 40, lies equidistantly between the two checkpoints at Bure.

MAPS ILLUSTRATING THE DELIMITATION LINE

8.2 The boundary as described above is illustrated on the following maps:

(i) Map 10 – The Western Sector on a scale of 1:1,000,000.

(ii) Map 11 – The Central Sector on a scale of 1:360,000. In addition, the line in this Sector is illustrated on a map in a scale of 1:50,000, provided in two sheets (Map 14 showing the Belesa Projection and Map 15 showing the Endeli Projection) inside the back cover of this Decision.

(iii) Map 12 – The Eastern Sector on a scale of 1:1,000,000.

(iv) Map 13 – A single map illustrating the whole boundary on a scale of 1:2,000,000.

A *definitive* map of the whole boundary on a scale of 1:25,000 will be produced on a sector-by-sector basis as each sector is finally demarcated and the exact coordinates of the locations of the boundary markers have been determined.

REFERENCE POINTS

8.3 The coordinates of all reference points mentioned in this Decision, including even those not used in paragraph 8.1, above, are specified in the following table. Apart from Point 7A, of which the coordinates were submitted by Eritrea, coordinates of all the points have been measured from the SPOT satellite imagery of 10-metre resolution based on the WGS-84 datum. Except as otherwise indicated, all coordinates have been computed to the nearest one tenth of a minute, which corresponds to approximately 0.18 kilometre on the ground. The principal reason for using this specification is because of the limited availability at the present stage of information on the maps available to the Commission. All coordinates will be recalculated and made more precise during the demarcation as the Commission acquires the additional necessary information.

Point	Latitude (N)	Longitude (E)	Description
1	14° 15.4'	36° 33.6'	Western terminus – centre of Setit opposite the tripoint between Eritrea, Ethiopia and Sudan.
2	14° 18.7'	36° 38.3'	Confluence of Setit and one of its tributaries by passing Om Hajer, approximate location of Khor Um Hagar.
3	14° 19.1'	36° 49.7'	Confluence of Setit and Maiteb as claimed by Ethiopia.
4	14° 24.8'	37° 21.1'	Confluence of Setit and Sittona, which is called "Maetebbe/Maeeteb" on the 1894 de Chaurand map and on some later maps.
5	*14° 15'	37° 28'	Confluence of Setit and another Meeteb as depicted on some maps after 1902.
6	14° 11.0'	37° 31.7'	Confluence of Setit and Tomsa.
7A	14° 05' 45.6"	37° 34' 26.4"	Turning point from Setit to Mareb as claimed (in coordinates) by Eritrea. See paragraph 5.15, above.
7B	14° 05.8'	37° 34.7'	Turning point from Setit to Mareb as drawn by Eritrea. See paragraph 5.15, above.
8	14° 04.0'	37° 35.8'	Confluence of Setit and Maiten.
9	14° 53.6'	37° 54.8'	Confluence of Mareb and Mai Ambessa.
10	*14° 48'	37° 58'	Confluence of Mareb and Gongoma stream as depicted on the 1904 Afra map.
11	14° 38.0'	39° 01.3'	Confluence of Mareb and Belesa.
12	14° 38.3'	39° 06.2'	Confluence of Belesa A (Belesa/Ruba Dairo) and Belesa B (Tserona/Mestai Mes).
12A	14° 24.6'	39° 15.2'	Confluence of Belesa A and an unnamed tributary at which the Eritrean claim line turns to the northeast and leaves Belesa A.

* Coordinates have been computed to the nearest minutes because the point location is only an approximate location based on historical maps submitted by the Parties.

13	14° 35.0'	39° 14.2'	Confluence of Belesa B and Belesa C (Sur).
14	14° 29.1'	39° 16.0'	Confluence of Belesa B and an unnamed tributary.
15	14° 28.3'	39° 14.9'	Source of the above-mentioned tributary.
16	14° 28.0'	39° 14.8'	Source of an unnamed tributary of Belesa A.
17	14° 27.1'	39° 13.7'	Confluence of the above-mentioned tributary and Belesa A.
18	14° 27.8'	39° 21.6'	Point lying 100 metres west of the centre of the road running from Adigrat to Zalambessa.
19	14° 31.1'	39° 22.2'	Source of one of the headwaters of Belesa C.
20	14° 31.1'	39° 23.0'	Source of one of the headwaters of Muna (Berbero Gado).
21	14° 30.1'	39° 32.3'	Confluence of Muna and Enda Dashim.
22	14° 31.3'	39° 30.4'	Confluence of Enda Dashim and one of its tributaries flowing from the north.
23	14° 32.9'	39° 30.5'	Confluence of the above tributary and a higher tributary flowing from the northeast.
24	14° 34.3'	39° 31.7'	Source of one of the headwaters of the higher tributary.
25	14° 34.8'	39° 31.9'	Source of one of the headwaters of a tributary flowing towards Endeli from the west.
26	14° 36.2'	39° 38.3'	Confluence of the above tributary and Endeli.
27	14° 30.7'	39° 47.4'	Confluence of Muna and Endeli near Massolae.

28	**14° 27'	39° 59'	Approximate point near Rendacoma where Muna/Endeli continues as Ragali.
29	14° 32.9'	40° 05.6'	Point where Ragali Delta starts.
30	14° 33.1'	40° 08.5'	Turning point in Ragali Delta.
31	14° 23.2'	40° 12.8'	Point at which the boundary under the 1900 Treaty reaches the Salt Lake and where the boundary under the 1908 Treaty starts.
32	14° 24.1'	40° 14.9'	Turning point designated in Eastern Sector.
33	14° 08.5'	40° 52.7'	Turning point designated in Eastern Sector.
34	13° 32.9'	41° 19.4'	Turning point designated in Eastern Sector.
35	13° 24.8'	41° 34.9'	Turning point designated in Eastern Sector.
36	13° 20.3'	41° 39.7'	Turning point designated in Eastern Sector.
37	13° 05.5'	41° 53.8'	Turning point designated in Eastern Sector.
38	12° 48.2'	42° 02.3'	Turning point designated in Eastern Sector.
39	12° 45.9'	42° 13.1'	Turning point designated in Eastern Sector.
40	To be determined during demarcation.		Between the two checkpoints of Eritrea and Ethiopia at Bure.
41	12° 28.3'	42° 24.1'	Eastern terminus at the border of Djibouti.

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** Coordinates have been computed to the nearest minutes because the location where Muna/Endeli continues as Ragali is not well-defined.

Map 13

International Boundary
between
the State of Eritrea
and
the Federal Democratic Republic of Ethiopia

Mercator Projection
Datum: WGS-84
Scale: 1:2,000,000

Base map is taken from the 1:1,000,000 Vector Map Level 0 (VMAP 0) produced by the U.S. National Imagery and Mapping Agency. Place names are compiled by the Commission based on various sources (see "Technical Note Relating to Maps").

This map is produced for illustrative purposes only.

20 0 20 40 60 80 km

Eritrea-Ethiopia Boundary Commission

ERITREA
SUDAN
Red Sea
YEMEN
DJIBOUTI
ETHIOPIA
DANAKIL
Asmara
Ducambia
Om Hajer
Setit
Setit
Khor Royan
Tomsa
Mai Ambessa
Mareb
Mareb
Belesa
Tserona
Senafe
Zalambessa
Adigrat
Muna (Berbero Gado)
Endeli
Ragali
Salt Lake
Assab
Bure
16°30'
16°00'
15°30'
15°00'
13°00'
12°30'
36°30'
37°00'
37°30'
38°00'
38°30'
39°00'
39°30'
40°00'
40°30'
41°00'
41°30'
42°00'

Done at The Hague, this 13th day of April 2002,

Professor Sir Elihu Lauterpacht, President

Prince Bola Adesumbo Ajibola

Professor W. Michael Reisman

Judge Stephen M. Schwebel

Sir Arthur Watts

Bette E. Shifman, Registrar

Dr. Hiroshi Murakami, Secretary

APPENDIX A

The Subsequent Conduct of the Parties in the Sector Covered by the 1900 Treaty

This Appendix examines some items which, though presented at length by the Parties, have been found by the Commission not to affect the delimitation established by the interpretation of the 1900 Treaty.

THE 1904 BOUNDARY COMMISSION

A1. In 1904 Italy appointed a Commission of four officers to examine part of the Belesa-Muna boundary. Its operation had been discussed with Ethiopia. Ethiopia, while not formally a member of the Commission, despatched a delegate to it, Degiasmac Garasellassie, chief of the Northern Tigray. The Commission thus appears not to have been formally a joint body, although much of its work was conducted by the Italian Commissioners and the Ethiopian delegate working together. They did not, however, agree on all matters, and in particular did not reach agreement on the product of the Commission's work. The report of the Commission was a unilateral, internal Italian document, signed only by the Italian Commissioners. It was addressed to the Italian Government alone rather than to both Governments jointly.

A2. The Commission did not have agreed terms of reference, each Party apparently having given its personnel their separate – and seemingly differing – instructions. The task of the Italian members was to "determine in the field the actual and legal border of the colony between Belesa and Muna, as resulting from the treaty between Italy and Ethiopia of 10 July 1900, Art. 1 and, more specifically, from the sketch appended to the above treaty." The Ethiopian delegate's mandate was somewhat different, namely, "to identify non-controversial points concerning the border . . . and to find out points in which his opinion may be difficult to reconcile with that of the Italians." Any "points of contention" were to be left for the Emperor to negotiate with the Italian Government – a power in effect to deal with matters *ad referendum*. Unspecific though these references may be, it is clear that the Emperor instructed Garasellassie at least to accompany the Italian Commission and to participate to some extent in its work. Indeed, delegates of both sides were involved in the reconnaissance:

> . . . the delegates of the two parties carried out reconnaissance along all the course of the frontier, thus giving the Italian delegates the opportunity of indicating in situ to the repre-

sentatives of HM the Emperor of Ethiopia, the entireties of the territories that the Treaty above mentioned placed in our possession.

A3. The Commissioners started their journey at Mai Anqual on the Belesa identified in the present Decision as the Belesa A. They walked upstream to the headwaters and across to the headwaters of the river they identified as the Muna, and then down towards the confluence of that river and the Endeli at Massolae. The Commission's report was accompanied by a detailed map of the region prepared by one of its members, Checchi. The report's recommendations were in part as to positions which Italy might adopt in future regarding the boundary alignment. The report and map appear to be undated (other than by "April 1904" on the title page of the report); they were not published until 1912.

A4. The Commission followed the route which took the boundary around the perimeter of what the present Commission calls the Belesa projection. The map annexed to the Commission's report depicts a simplified course of the Belesa A as flowing directly into the Mareb and without showing the junction with the Belesa A of either the Belesa B (although upper reaches of the Mestai Mes, which is what the Commission refers to as Belesa B, are shown) or the other tributary flowing into the Belesa from the northeast near its junction with the Mareb and known as the Tserona. The Italian Commission's terminal point at Massolae was apparently chosen because it was the end of the Muna, where it joins and becomes part of the Endeli.

A5. The Commission's report stated that in reaching Massolae it had completed its task, "i.e. it followed the geographical border that the Treaty of 1900 intended to establish for the Eritrean colony . . . ." The present Commission observes that this view of the Italian 1904 Commission does not necessarily imply that the Treaty boundary ended at Massolae. The Treaty boundary was delimited in terms not just of the "Muna" but also of the depiction of the river so named on the Treaty map. The Italian Commission's remit was to consider the Treaty boundary "between Belesa and Muna," which, particularly since the boundary eastwards of Massolae followed clearly identified rivers, was consistent with an internal requirement to go to the end of the geographical Muna, rather than the end of the Treaty "Muna" which was, by the Treaty and its map, given a more extended meaning.

A6. The report contains a number of features that must be noted.

A7. First, note must be taken of the absence of any agreed terms of reference for the Commission's work (para. A2, above). Despite the task of the Italian Commission being described in terms relating to the border resulting from the 1900 Treaty, its report carried as its principal title "The Border between the Scimezana, which forms the southern part of Acchele Guzai, and the Agame."

As appears from a map produced by Ethiopia, published in or around 1902 by the Italian Directorate of Colonial Affairs (the same department which published the 1904 Commission report) and prepared by Checchi, Giardi and Mori ("the 1902 Checchi map") the "Residenza dello Scimezana" is a substantial district in the southern part of Eritrea extending from the Residenza del Mareb in the west to the Missione Dancali in the east. Its southern limits as marked on this map follow, from the west, the Belesa and, via its southern channel (Belesa A), wind round, across land, eventually to join a river that clearly bears the name "Mai Muna." This in turn flows into the "F. Endeli," flowing from the northwest, and thence onto Rendacoma. Though not marked on this map, the area to the south is Agame.

A8. Secondly, the report repeatedly refers[1] to the Muna and at no point expresses any doubt as to its existence or identity and location. Indeed, at more than one point the report is so worded as to indicate that specific reference was made to the Muna in the instructions given to Garasallesie as well as the Italian Commissioners.

A9. Third, various places that would, on the Ethiopian approach to the matter fall, within Agame (Ethiopia) are clearly recognised as falling within Acchele Guzai (Eritrea), e.g., Alitena, which lies a short distance north of the Muna.

A10. Fourth, the report records that certain places in the Belesa projection which, on the Eritrean approach, would be in Eritrea were in fact under the control of Ethiopia.

A11. Fifth, in referring to the territories of Sebao and Kelloberda as being "located on the right hand side of that section of the River Belesa which according to the Treaty of 1900 was part of the border line between Ethiopia and Eritrea," the 1904 Commission was referring to places located on the map just to the east of the Belesa A and to the west of the Belesa B. It is clear from the passage just quoted that the 1904 Commission took the view that the Belesa A was the river that bore the name "Belesa" on the maps.

A12. Sixth, while the 1904 Commission considered that the "question of the Belesa territories is much less complex and susceptible to discussion," it clearly found the question of identifying the "Muna" referred to in the 1900 Treaty more uncertain and open to argument.

A13. Seventh, the map annexed to the Commission's report and illustrating the route taken by the Commission depicts three different border lines, designated as

[1] In its paras. 7, 8, 11, 12.

"limite dell'attuale occupazione nei tratti da modificare" ("outer limit of current occupation to be modified"), "limite di confine che non subisce modificazioni" ("limit of the border that is not to be modified") and "confine secondo il trattato del 1900" ("border according to the Treaty of 1900"). It is noteworthy that, even in 1904 (and as reprinted in 1912), this map delineates as the limits of actual occupation a line very close to that which is claimed by Ethiopia to the north of the Endeli projection. As a further observation, the Commission notes that on two maps published in January and February 1904, two members of the Italian Commission, Checchi and Garelli, show very similar "limits of actual occupation," while the second of these maps (dated after the conclusion of the 1904 Commission's work) shows the line encompassing the Belesa projection as only a claim line ("confine da revendicare").

A14. Eighth, the Commission clearly followed the course of the Belesa A, apparently without any suggestion from the Ethiopian delegate that that was the wrong river or that it lay wholly within Ethiopia, as would have been the case if the Belesa B were the boundary.

A15. Ninth, it must be observed that the 1904 Commission's view, like that of Eritrea, as to both the initial sector along Belesa A and across to the Muna, is inconsistent with the depiction of the boundary line on the Treaty map. Moreover, the Commission's report noted that at least some locations within the Belesa projection were under the control of Ethiopia, particularly Kelloberda and Sebao.

A16. Taking all these elements into account, the present Commission is not satisfied that it may treat the activities and report of the 1904 Commission as an agreed interpretation or variation of the 1900 Treaty, or as evidencing Ethiopian acquiescence in any interpretation or variation such as to attribute the Belesa projection to Eritrea. Nonetheless, the present Commission accepts that in tracing the Muna upstream from its confluence with the Endeli towards its headwaters south of Barachit, the 1904 Commission's report fairly represented that part of the boundary established by the 1900 Treaty. It is the line followed and described in its report by the 1904 Commission, that extends westwards beyond the longitude of Barachit so as to encompass the Belesa projection, as well as the alleged termination of the boundary at Massolae in the east, which the present Commission finds unsupported by the 1900 Treaty and its annexed map.

THE LEAGUE OF NATIONS

Ethiopia's admission to the League of Nations, 1922

A17. Eritrea asserts that "Ethiopia's first affirmation of respect for the established boundary occurred in 1922, when it applied for admission to the League," that

admission being conditional upon a determination by the League that Ethiopia had well established borders. Ethiopia notes that its request for admission contained no reference to the question of boundaries, that the League's documentation was essentially of a "standard form" variety with no singular conditionality being insisted upon, and that some measure of uncertainty regarding frontiers was an accepted part of the League's practice.

A18. The Commission observes that Ethiopia's admission to the League of Nations in 1922 was conditional upon a determination by the League that Ethiopia had well established boundaries. Such a requirement was, following precedent established by the first three League Assemblies, covered in a questionnaire used for the admission of new Members. That questionnaire included, as the third question: "Does the country possess a stable government and well-defined frontiers?" The Sub-Committee appointed to consider Ethiopia's admission simply stated that "[t]he reply to the third question is in the affirmative." The Commission cannot draw from that terse statement any particular conclusion as to the agreed line of the Eritrea-Ethiopia frontier.

Events in 1935

– The WalWal incident

A19. In connection with the WalWal incident in the Ethiopia-Italian Somaliland region, there were proceedings before the Council of the League of Nations in 1935. Both Ethiopia and Italy presented maps which, according to Eritrea, depicted the colonial boundary in its "classical" contour. Ethiopia notes that the League's concern with the WalWal incident was irrelevant to Ethiopia's northern boundary, with Eritrea.

A20. So far as concerns the boundary in the Belesa-Muna sector, the Commission observes that this Italian map is drawn on a scale of 1:4,000,000. At this scale, and with a virtually complete lack of detail of the surrounding areas and, despite a broad southward sweep in the line which might (or might not) be intended to represent the Belesa projection, no useful or detailed conclusions can be drawn about the course which Italy (or Ethiopia) understood was followed by the Belesa-Muna line.

A21. Eritrea refers also to four maps supplied by Ethiopia, but admits that two of them "are vague" and that the third did not deal with the Eritrea-Ethiopia frontier. The fourth map was that published in 1909, in Carlo Rosetti's "Storia Diplomatica dell'Etiopia", 3rd edition. Although Eritrea asserts that this map shows the "classic signature of the colonial treaty boundary," the Commission notes that at least in the Belesa-Muna sector it too, at a scale of 1:5,000,000 and with virtually no surrounding detail, cannot support any useful or detailed

conclusions about the route which Italy (or Ethiopia) understood was taken by the Belesa-Muna line.

– Tigrayan incursions, 1935

A22. As part of its response to Ethiopia's complaint about the WalWal incident, Italy in 1935 drew attention to incursions by Tigrayan elements across the Belesa-Muna line into Eritrean territory.

A23. The Commission notes that although Italy did indeed make such a complaint, and although Ethiopia's response did not expressly deny Italy's assertions as to the location of the frontier, Ethiopia's principal concern with this incident was to deny responsibility for the actions of what it portrayed as local Tigrayan warlords and bandits. Moreover, these exchanges in 1935 took place immediately before Italy's invasion of Ethiopia on 3 October 1935. It is in the Commission's view also significant that the Italian complaint in effect admitted as a fact that 35 years after the 1900 Treaty Ethiopia was still in occupation of certain territories "including" (and therefore not limited to) those specifically mentioned, which on the Italian view had become part of Eritrea.

– Italy's complaint to the League of Nations, 1935

A24. Relations between Italy and Ethiopia became increasingly strained. In a memorandum dated 11 September 1935, less than a month before its invasion of Ethiopia, Italy stated that, given the 1900 Treaty, even by 1935 Ethiopia "had taken no steps to evacuate certain territories, including two posts on the right bank of the Belesa[2] (Kolo Burdo and Addi Gulti), one on the north bank of the Muna (Alitiena), which are quite indisputably in Italian territory." While Italy presented this as demonstrating Ethiopian intransigence, it is also evidence of Ethiopia's continued presence in those areas 35 years after the conclusion of the 1900 Treaty. Apart from that clear admission that Ethiopia had a continuing presence in the places mentioned (which was in line with other Italian statements to a similar effect), the Commission is unable to draw from Italy's statement in 1935 any conclusion as to the disputed question of title.

A25. In its 1935 Memorandum to the League of Nations Italy also cited Ethiopian attacks at Rendacoma, Cabuia and Colulli. These three alleged attacks do not seem to be directly in point in relation to the course of the disputed boundary, other than by constituting evidence that Italy considered the boundary to lie somewhere to the south of those three locations.

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[2] What the Commission is calling Belesa A.

THE UNITED NATIONS

Consideration of Eritrea, 1950

A26. The Parties also devoted considerable attention to developments in the United Nations during the period in 1950 in which the United Nations was considering the future of the former Italian colony of Eritrea. Eritrea noted that United Nations reports all treated the Muna as the boundary, and placed it in its historic location (i.e., as the Muna/Berbero Gado). Thus Eritrea drew attention to the work of the United Nations Commission for Eritrea (UNCE), and in particular to maps produced by UNCE to illustrate its work. Eritrea also attached particular weight to the United Nations Secretariat memorandum prepared in 1950 in the context of consideration at the United Nations of Eritrea's colonial boundaries. The memorandum, with its accompanying illustrative map, identified the Belesa and Muna as the boundary deriving from the 1900 Treaty. Eritrea notes that during the various United Nations debates on the question of Eritrea's future, Ethiopia knew of all these United Nations materials, but raised no objection.

A27. Ethiopia points out that United Nations organs in the period 1948-1952 were never specifically addressing the interpretation of the boundary treaties or their application, while the Secretariat memorandum was purely advisory, and identified no boundary dispute and proposed no settlement. Ethiopia adds that the United Nations discussions were concerned essentially with the future status of Eritrea rather than its boundaries, and that the United Nations memorandum implicitly acknowledged that questions or claims had arisen with regard to the Eritrea-Ethiopia boundary, including the Belesa-Muna sector. Ethiopia also notes that since the ultimate result, which was the outcome Ethiopia sought, was a form of union of Eritrea with Ethiopia, the question of boundaries was irrelevant and there was no need for Ethiopia to pay close regard to boundary depictions, particularly those of a very general nature. Eritrea responded that at the time such an outcome was not assured, and that in any event the territorial division was still important within the federation.

A28. The Commission observes that the UNCE maps referred to all appear to have used the same base-graphic, and were produced at a small (but unstated) scale and contained only limited detail of the boundary area. No relevant location to the south of Senafe is identified, nor are any rivers named. The depiction of the boundary, nevertheless, appears to show the Belesa projection as appertaining to Eritrea (and may even indicate a small northward variation in the boundary intended to represent the Endeli projection), but is otherwise too unclear to allow for the drawing of specific conclusions as to the course of the boundary. In particular, even if (which is unclear) the course of the Belesa A is suggested as the boundary, the UNCE maps are wholly indistinct as to the way in which this comes about or as to the route by which a Belesa boundary joins up with the

Muna and Endeli (neither of which is depicted). Moreover, the maps differ slightly from each other in the outline of the boundary they depict in this sector. It is also clear from the UNCE map depicting the places visited by UNCE, that that body did not visit any part of the now-disputed area in the Belesa-Muna region.

A29. As for the Secretariat memorandum, it simply made the incontrovertible statement that this part of the boundary was fixed by the 1900 Treaty, without going into details beyond stating that it provided for the boundary to run "eastward along the Mareb River to the Belesa River, eastward along the Belesa to the Muna River, and again eastward along the Muna." The map annexed to the Secretariat memorandum, although indicating by name the Mareb, Belesa and Muna, was at too small a scale (unstated) to support for that area any specific conclusions as to the details which are missing from the memorandum itself. While the various United Nations reports treated the border as fixed by the earlier treaties, none of them appears to have involved any serious investigation into what specifically had been agreed and what the Parties' attitudes were. In comparison with other boundaries where there had been no earlier treaty fixing them, it was understandable for the United Nations to have regarded them as 'settled' without enquiring into possible differences which might exist regarding their interpretation or application. In relation to the Belesa-Muna sector of the boundary the Commission has not been made aware of any specific aspect of the various United Nations materials which clearly and reasonably called for some objection by Ethiopia.

General Assembly Resolution 390(V)A, 1950 and the Federal Constitution, 1952

A30. The outcome of this United Nations activity in 1950 was the adoption by the General Assembly of Res. 390(V)A(1950), which led to a federation between Ethiopia and Eritrea. Article 2 of the 1952 Eritrean Constitution provided that "The territory of Eritrea, including the islands, is that of the former Italian colony of Eritrea." Ethiopia ratified this Constitution in August 1952, and in September the Emperor issued an Order providing for the federation of Ethiopia and Eritrea. As a federation, the territorial division of authority between the constituent units continued to be important. Eritrea contends that these constitutional arrangements, which were based on various UN decisions which in turn followed numerous UN reports accompanied by UN maps depicting, *inter alia*, the boundaries of Eritrea with Ethiopia, showed that "Ethiopia . . . accepted the boundaries of Eritrea as they were defined in the Eritrean Constitution and depicted by the United Nations."

A31. Ethiopia considers that, in accordance with the applicable principles of general international law, the change in Eritrea's status to that of federation with Ethiopia could have no effect on the original colonial boundaries of Eritrea: the

entity known as Eritrea remained within the same boundaries after the change as it had had before the change.

A32. The Commission observes that the definition of Eritrea in Article 2 of the Eritrean Constitution is neutral as to what were the boundaries of the former Italian colony of Eritrea. As for the United Nations maps to which Eritrea refers, they were not made part of the constitutional arrangements. In any event, in so far as they depict the Belesa-Muna sector of the boundary they were, as already noted, drawn at such small scales and were so devoid of accompanying detail that they cannot safely be used as a basis for drawing clear conclusions as to what Ethiopia must be taken to have acknowledged the boundary in that sector to be. The Commission thus finds it impossible to find in Ethiopia's omission to comment on these maps any acquiescence in any specific United Nations-depicted boundary in the Belesa-Muna sector.

MAPS

General

A33. The map evidence has been invoked in two different contexts. The first concerns the extent to which maps established a boundary outline that can be regarded as so clear and distinctive that its reproduction on later maps can be taken to represent a particular boundary line, even if the details of that line are not apparent on the later maps. The second concerns the impact of the map evidence, by reference to the individual merits of the maps as maps. The Commission will consider at this point the question of the boundary outlines. The more specific impact of the map evidence on the various boundary sections has already been considered in Chapters IV and V of the Decision.

A34. Eritrea maintains, generally, that with the conclusion of the 1908 Treaty, the colonial boundary was completed, and that it gave rise to a distinctive cartographic outline (which it refers to *inter alia* as "the classical signature of the boundary"). Eritrea maintains that that "classical" outline was consistently recognised by all concerned from 1908 onwards.

A35. So far as that "classical" outline relates to the 1902 and 1908 Treaties, the Commission has addressed the matter in the context of those Treaties. Here the Commission will only concern itself with the outline of the boundary in the stretch covered by the reference to the Mareb-Belesa-Muna line. In practice, since there is no dispute about the Mareb-Belesa section, the relevant section in the present context is the Belesa-Muna section. In that context Ethiopia denies the existence of any such generally recognised "classical outline."

APPENDICES

A36. There are four elements to a possibly distinctive general outline for this section of the boundary:

(i) The Treaty outline is that created by the map annexed to the 1900 Treaty. The Commission has already examined the Treaty map in detail.

(ii) The Belesa projection outline is the outline created, in the western part of the Belesa-Muna line, by its extension southwards so as to encompass the Belesa projection, i.e., principally the land between Belesa A and Belesa B together with an area of land running eastwards along the northern bank of the Muna/Berbero Gado. This is the outline established by the boundary claimed by Eritrea. The Commission notes that the distinctive silhouette of the Belesa projection has two elements: first, a broad curve in the north as the river flows up from the south and swings round to flow in a westerly direction towards the Mareb; and, second, a southward prolongation of the boundary as it follows the Belesa A into its southernmost reaches before swinging back up to the northeast to join the Muna/Berbero Gado. The claim lines of both Parties share a curve in the north, and a southward line which at some point turns to the east. At the level of general silhouette the difference between them is essentially one of degree, particularly as to the extent of the southward projection. This broad similarity of silhouettes makes it difficult on small scale maps to be sure which, if either, claim line is being depicted.

(iii) The Endeli projection outline is the outline created, in the central sector of the Treaty line, by extending the area of the Ethiopian claim northwards so as to encompass the Endeli projection, i.e., principally the land bounded on the northeast by the Endeli, on the south by the Muna/Berbero Gado, and on the west by a line dropping down southwards from the neighbourhood of Senafe and then curving round to the west until it joins the Belesa C headwaters near Zalambessa. This is the outline established by the boundary claimed by Ethiopia.

(iv) The "eastern terminus" outline is the outline created by the choice of the eastern terminus for the boundary established by the 1900 Treaty, in particular whether that terminus is at the Salt Lake (as indicated on the Treaty map), at Ragali (as claimed by Ethiopia), or at Massolae (as claimed by Eritrea, which has also suggested Rendacoma as in practice an alternative).

A37. In reviewing the voluminous map evidence presented to it relating to the Belesa-Muna sector of the boundary, the Commission notes that a number of the maps submitted are on such a small scale, or at a such a minimal level of detail, as to make it impossible to attribute to them a clear depiction of one outline or the other. These maps do little more than show a more or less wavy line joining the

northern curve of what is clearly intended to be the Belesa system to a point somewhere in the vicinity of the Salt Lake. It is difficult to attribute to these maps any clear and consistent depiction of a distinctive boundary outline in the Belesa-Muna sector.

A38. Those maps which are at a scale and level of detail allowing conclusions to be drawn from their depictions of the boundary enable the Commission to make the following observations:

(i) The outlines created by the Belesa projection and by the Endeli projection are recognisable departures from the Treaty line.

(ii) Those outlines as shown on many maps are often precise enough to allow specific conclusions to be drawn as regards the placement of the boundary along the Belesa A or Belesa B, or the upper reaches of the Endeli, or the Muna/Berbero Gado.

(iii) Those outlines, however, are often not precise enough to enable specific conclusions to be drawn as to the course being followed by the link between whichever of the Belesas is in question and the Muna/Berbero Gado, or of linking the Belesa B with the upper reaches of the Endeli.

(iv) A number of maps depict a boundary which may be classified as depicting the 1900 Treaty line, in particular the Italian "Carta Dimostrativa" of 1902, prepared by the Ministry of Foreign Affairs (the "Prinetti map"). This map was submitted to the Italian Parliament, apparently as part of the procedures for the ratification of the 1902 Treaty. That Treaty amended the boundary prescribed by the 1900 Treaty. The map accordingly indicated the original course of the boundary as in the 1900 Treaty, and the course of the new boundary being prescribed by the 1902 Treaty. The 1900 Treaty boundary which it depicts is in essence the boundary which the Commission has determined was the boundary laid down by that Treaty. It follows a generally sloping line from the northern shoulder or curve of the Belesa in the west, along the Muna/Berbero Gado, and down to the Salt Lake. It gives no indication of either the Belesa projection or the Endeli projection. Given the map's provenance, its apparent purpose (specifically to illustrate boundaries, as part of the State's ratification procedure), and its contemporaneity, the Commission considers this map to have considerable weight.

(v) While many of the maps produced in evidence show quite clearly a boundary outline which is equivalent to that of the Belesa projection, it cannot be said that that outline has been adopted with clearly preponderant consistency. There are a significant number of maps, of a

provenance which requires that they be given weight, which do not depict a Belesa projection.

(vi) Few of the maps produced in evidence depict the outline of the Endeli projection as a boundary, and none emanating from Ethiopian sources (apart from the recent 1998 Atlas of Tigray) do so. Particularly noteworthy is the absence of any Endeli projection from Ethiopia's map of 1923 (the 'Haile Selassie map'). This map, produced for the Emperor Haile Selassie in 1923, appears to have been prepared as a single presentation map and not to have been intended for publication. It is now in the Library of Congress. It shows the boundary in the Belesa-Muna sector as a line closely following that of the 1900 Treaty map: it identifies the boundary by (in Amharic) "Mai Muna" and depicts the boundary as following a course to the south of Barachit. In particular the map appears to show no trace of either a Belesa projection or an Endeli projection. The map is not a model of clarity and is on a fairly small scale (1:1,000,000). Moreover, it appears to depict the boundary beyond each end of the Belesa-Muna sector in a manner which differs from its depiction in that sector, namely by a dash-dotted line in the former case but without that marking in the Belesa-Muna sector. The map is of some significance because it is invoked by Ethiopia in other contexts, particularly in relation to the 1902 Treaty, as being an "official map" of "official Ethiopian government provenance." This map's apparent original purpose was more in the nature of a private production destined for presentation to the Head of State of Ethiopia.

(vii) There are however, maps, especially from Italian sources, which depict something very close to the Endeli projection as an express or implicit limit of actual Italian possession both in the early years after the conclusion of the 1900 Treaty and some decades later and which appear to indicate (by an absence of boundary marking) a degree of doubt as to any boundary cutting Irob off from Ethiopia.

(viii) As regards the eastern terminus of the 1900 Treaty boundary, the Commission has been unable to determine a consistency of practice in the depiction of the boundary on maps sufficient to constitute a generally accepted outline or silhouette for the boundary in that area.

A39. The Commission thus concludes that it has not been established in the Mareb-Belesa-Muna sector that there is a generally accepted outline or silhouette for the boundary which can serve as evidence of the Parties' agreement as to the course of the boundary. This is not, of course, to deny to maps which depict the boundary following one or other of the distinctive shapes, or any other boundary line, a significance on their own particular merits. This is a matter which the Commission has considered in Chapter IV, above.

APPENDIX B

The Location of the Cunama

CONTEMPORARY KNOWLEDGE

B1. At the time of the negotiation of the 1902 Treaty, there was little publicly available information regarding the location of the Cunama and few pertinent maps. Although there is no evidence of whether Menelik and Ciccodicola were aware of this material, the Commission refers to it here to indicate its limited value:

B2. One of the earliest investigations resulted in a "Report of the German Expedition to East Africa, 1861 and 1862" (published in 1864) which contains statements by Munzinger identifying the eastern extension of the Cunama, e.g., that "the Bazen around the Takeze are rather exposed to attacks coming from the Wolkait" (the names "Baze" and "Basé" were also used for the Cunama at that time). As shown on the map illustrating the expedition's travels, the Wolkait is an area lying to the south of the Setit and east of the confluence with it of the western Maiteb. Therefore, if the Bazen were being attacked by the Wolkait, they must have been present at least in the area just north of the Setit. In that location, they would have been living in Ethiopian territory, southeast of the line that Ethiopia has subsequently come to claim as the boundary – a position which is not in accord with the principle that the Cunama are to be enfolded in Eritrean territory. Their extension further to the north and east is evidenced by the statement in the German report that their easternmost locality along the Mareb is the Mai Mai-Daro.

B3. The British explorer, Sir Samuel Baker, writing in 1867 of "The Nile Tributaries of Abyssinia", mentioned "the hostile Basé, through which country the River Gash or Mareb descends . . . . I was anxious to procure all the information possible concerning the Basé, as it would be necessary to traverse the greater portion in exploring the Settite river." This is of little help beyond indicating that the Cunama inhabited the area between the Mareb and the Setit and that for purposes of exploring the Setit it would be necessary "to traverse the greater portion" of their country.

B4. A few years later Munzinger[1] again described the eastern border of the Cunama by reference to the hills around the Godgodo Torrent (east of the Ethiopian claim line) but within the area embraced as Eritrea within the Eritrean line. His description even extends south of the Setit, in an area which is not disputed as

[1] *Studies on Eastern Africa* (circa 1875).

being in Ethiopia, but is still east of the southern starting point of the Ethiopian claim line; and it seems improbable that the tribe would have been east of that point south of the river, but not east of it north of the river. At that time, Munzinger estimated the Cunama population as being approximately between one and two hundred thousand inhabitants.[2] (By 1913, however, an Italian scholar, Alberto Pollera, reported a 1905 census estimating a population of 19,000 and stated that many Cunama villages had been destroyed.[3]) Renisch, who wrote "Die Kunama-Sprache in Nordost-Afrika" in 1881 indicated that the "Kunama" people lived between 36° and 38° E and between 14° and 15° 30' N – an eastwards extension that would have taken them well east of the Ethiopian claim line.

B5. As to the available maps, though not identical they generally so place the name "Cunama" that the region thus indicated stretches over the whole or most of the area that falls within Eritrea as delimited by the Eritrean line. In other words, the Cunama area would be cut in two by the recognition of the Ethiopian line, thus contradicting the principal object of the 1902 Treaty.

B6. In the map that illustrates the "German Expedition in East Africa", Munzinger placed the name "Bazen" across that area so that it appears clearly related to a stretch of country that extends eastward as far as the hills that mark the western limits of Adiabo. Having mentioned the extension of the Cunama to the hills around the Godgodo Torrent and, it seems, Tsada Mudri, he marked those places on his map as being at 38° E and 38° 10' E respectively. De Chaurand's map extends the name "Cunama" as far east as 37° 50' and marks the general area of their occupation by a line of dashes which, according to the legend on the map, indicates a tribal division.

B7. A map of the Catholic Missions of North-East Africa published in 1899 shows the Baza as occupying a wide swathe of territory between the Setit and the Mareb extending, on the Mareb, considerably to the east of Mai Daro and, on the Setit, as far as a river called "Manatape" which appears to approximate to the Sittona.

B8. A map of the region given by the Italian Ambassador in London to the British Foreign Secretary in July 1900 carries the names "Baza o Cunana" extending in large print over the area between the Mareb and the Setit. Assuming that the names were placed central to the area to which they were meant to apply, it would appear that the area thus indicated by them extended in the east as far as 38° of longitude E, thus covering the whole of the area subsequently claimed by Eritrea as falling within its line.

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[2] *Ibid.*, at pp. 341 and 373.

[3] *I Baria e I Cunama*, p. 76 (1913).

POLLERA REPORT

B9. On 17 May 1904, the Resident of the Government Seat of Gasc, Pollera, reported on the eastern border of the Cunama region as follows:

> Under the 1902 Italian-Abyssinian Convention for the cessation of the territory between the Gasc and the Setit, it was established that the border between these two rivers would be the Mai Teb, from its source, then continuing a little to the east of Hai Derg.
>
> Your Excellency's visit to the region made it clear that the contracting parties had been misled by the erroneous graphic representation of the maps, and that everything that referred to the Mai Teb Hovevasi actually must be attributed to the Sittona stream. In any case, since the course of said river was not recognised by anyone, the border could not be considered established in a final and binding manner, at least under the treaty in question, leaving it, at the time, up to the special delegates to make this delimitation, with the purpose, established in the treaty, of leaving the entire region of the Kunama in Italian territory.
>
> Consequently, we decided to consider for now that the border line between the Gasc and the Setit is the Ducambia Mittona [*sic*] road, which was quickly built in order to affirm the possession of that region.
>
> But, from what I learned later, the Kunama country is much more to the east, and therefore I believe it is appropriate to visit this vast area, never before explored by any European, in order to find out its structure and obtain the data necessary for the subsequent delimitation of the border, if considered necessary.
>
> In the enclosed sketch, I marked the line which, according to Kunama tradition, would constitute the border with the Adiabo. It includes the entire territory still roamed by the Kunama, and which was originally inhabited by them, used to harvest honey and rubber from the banks of the Setit and of the Gasc.
>
> However, since there was never any pact between Kunama and Adiabo, the border is not acknowledged by the latter, who have always considered the region of Afrà as their own hunting territory. Moreover, it is marked by the particularity of the land distant from it, and is often not clearly marked,

and therefore there is the need for a line which will be difficult to make well known. The official acknowledgment of that line, in any manner, is of little advantage. The regions established at the time on the bank of Setit from the Sittone mountain to the Ab Onú mountain have been destroyed, and for the few remaining inhabitants, now living on the Gasc, there is no advantage to returning to their original places, because this would require distant supervision, difficult and of little interest.

The left bank of the Gasc, however, will be gradually repopulated, and the Kunama groups currently living east of the Gongomà stream, in Abyssinian territory, will be attracted again to their old place, namely in the region ranging between the concave part of the arc formed by the Gasc and Hai itself.

Although there is, therefore, an interest in acknowledging their the right to the entire left bank of the Gasc up to the Gongomà stream, this interest wanes as they go towards the south, where perhaps it would be sufficient if the tribes under our supervision would recognise their right to seek honey and rubber.

Consequently, in my opinion, I do not think that it is possible to make a true and suitable delimitation of the border. However, by an additional convention besides that of 1902, it would be possible to establish:

1. That, in accordance with the preceding agreement, I will ask that all Kunama tribes be left in Eritrean territory, under the administration and command of the Italian Government, including all those groups which are still in Abyssinian territory; except in the case of evacuation of this territory and return within Eritrean borders within a period of two years;

2. That the entire valley of the Gasc, and its tributaries downstream from the juncture of the Gongomà stream, is considered Italian territory.

3. That the zone west of the Mesegà, which covers the western slopes of the Adiabo mountains, delimited by the juncture of the Gongomà stream to the north and the source of the Tonsa stream to the south, down to the Sittona Ducambia road, is considered neutral zone, with prohibition of hunting for each of the contracting parties, and under the supervision of the Italian government,

except for the rights to seek honey and rubber, granted to the Baza tribes.

Since the convention can be discussed and signed between the two Governments, it would avoid the biased influence of Tigrai chiefs and especially Adiabo, who would certainly obstruct as much as they could the tracing of a border that takes away their freedom to hunt in a territory they consider their own by occupancy rights, and the last Kunama villages which they consider slaves, and therefore, almost private property.

If, later, there is an absolute intention to establish a de facto border, the only one that offers better advantages is that which I have indicated in the sketch, and which, starting from the source of the Tonsa stream in Setit, goes up its course and, through its tributaries Nebi Ualà and Gual Sohei reaches Roccia Cassona: then, passing through M. Aiculità, the hill of Guzulà and the baobab known by the Kunama by the name of Bedumà Asà and by the Abyssinians by the name of Ababà [illegible], crosses the great Mezzegà and reaches the Gongomà stream, whose source is in fact the Mezzegà.

However, the region of Ulcutta will remain beyond the border, for which it will be desirable to obtain what I proposed above, since it does not seem appropriate to me to include it within the new border because it is located in territory that is actually and incontestably Abyssinian . . . .

APPENDIX C

Technical Note Relating to Maps

C1. Because it was agreed with the Parties at an early stage in the Commission's work that the fieldwork necessary to prepare a large scale map for demarcation, on a scale of 1:25,000, should not commence until after the delimitation Decision, the Commission has for the time being been obliged to use other sources of maps and images. These sources include:

(i) 1:100,000 Soviet Union Topographic Mapping Series.

(ii) 1:1,000,000 Vector Map Level 0.

(iii) SPOT 10-metre resolution, panchromatic, ortho-rectified imagery.

(iv) ASTER/TERRA 15-metre resolution, multi-spectral, ortho-rectified imagery.

(i) The 1:100,000 Topographic Mapping series was produced by the Soviet Union in the 1970s, has been the largest scale set of maps available to the Commission. Both Parties used these maps in their pleadings and submissions.

(ii) The 1:1,000,000 Vector Map Level 0 (VMAP0), produced by the United States National and Imagery and Mapping Agency in the early 1990s, has been used to generate the small-scale illustrative maps attached to the Decision. River tributaries that may be relevant to the Decision, but are omitted from the VMAP0 data, have been copied to the small-scale maps in the Decision from the Soviet 1:100,000 series or from the satellite imagery. Both Parties used VMAP0 to generate their small-scale maps in their pleadings and submissions.

(iii) Satellite imagery acquired from the French SPOT satellite, which has a resolution of 10 metres per pixel and is panchromatic, has been ortho-rectified using ground control points collected by the Field Offices of the Secretary of the Commission to produce a series of satellite maps on the scale of 1:50,000. These maps have been used to verify so far as possible the existence of towns and natural features on the ground, including rivers and their tributaries. These maps also serve as the base for illustrating the Decision in the Central Sector. Measurements in the Decision have been based on this series.

(iv) Satellite imagery acquired from the Japanese ASTER/TERRA satellite, which has a resolution of 15 metres per pixel and multi-spectral bands, has been ortho-rectified to provide images for the interpretation of terrain features.

C2. Towns shown in this Decision have been compiled from the 1:100,000 series and verified against the satellite imagery of SPOT and ASTER/TERRA. If a town is not shown on the Soviet maps, its approximate location has been determined on the basis of the submissions of the Parties.

C3. The reference system of the measurements and maps used in this Decision is the World Geodetic System 1984 (WGS-84). For all practical purposes related to this Decision, the WGS-84 datum is the same as the Eritrea Ethiopia Boundary Datum 2002 (EEBD-2002) that is being developed for the demarcation of the boundary. In the *Dispositif*, Chapter VIII, all coordinates have been computed in latitude (N) and longitude (E) to the nearest one-tenth of a minute in terms of the WGS-84 datum except as otherwise indicated. This produces a resolution of approximately 0.18 km on the ground. The coordinates will be made more precise by the new mapping to be made during the demarcation phase.
